S. HRG. 100-684

REAUTHORIZATION OF THE OFFICE OF FEDERAL PROCUREMENT POLICY

HEARING

BEFORE THE

SUBCOMMITTEE ON
FEDERAL SPENDING, BUDGET, AND ACCOUNTING

OF THE

COMMITTEE ON
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

SECOND SESSION

MARCH 25, 1988

Printed for the use of the Committee on Governmental Affairs

U.S. GOVERNMENT PRINTING OFFICE
85-672 WASHINGTON : 1988

For sale by the Superintendent of Documents, Congressional Sales Office
U.S. Government Printing Office, Washington, DC 20402

S401-53

COMMITTEE ON GOVERNMENTAL AFFAIRS

JOHN GLENN, Ohio, *Chairman*

LAWTON CHILES, Florida	WILLIAM V. ROTH, Jr., Delaware
SAM NUNN, Georgia	TED STEVENS, Alaska
CARL LEVIN, Michigan	WILLIAM S. COHEN, Maine
JIM SASSER, Tennessee	WARREN B. RUDMAN, New Hampshire
DAVID PRYOR, Arkansas	JOHN HEINZ, Pennsylvania
GEORGE J. MITCHELL, Maine	PAUL S. TRIBLE, Jr., Virginia
JEFF BINGAMAN, New Mexico	

Leonard Weiss, *Staff Director*
Jo Anne Barnhart, *Minority Staff Director*
Michal Sue Prosser, *Chief Clerk*

Subcommittee on Federal Spending, Budget, and Accounting

LAWTON CHILES, Florida, *Chairman*

SAM NUNN, Georgia	WARREN B. RUDMAN, New Hampshire
CARL LEVIN, Michigan	TED STEVENS, Alaska
JEFF BINGAMAN, New Mexico	JOHN HEINZ, Pennsylvania

Robert F. Harris, *Staff Director*
Robert E. Coakley, *Deputy Staff Director*
Santal Manos, *Minority Staff Director*
Daisy M. Minter, *Chief Clerk*

CONTENTS

Page

Opening statements:
  Senator Chiles ... 1
  Senator Bingaman ... 3
  Senator Levin ... 10
  Senator Glenn ... 12
  Senator Pryor ... 12
  Senator Heinz ... 13

WITNESSES

FRIDAY, MARCH 25, 1988

Charles Bowsher, Comptroller General, General Accounting Office, Washington, D.C., accompanied by Milton J. Socolar, Special Assistant to the Comptroller General, and Paul Math, Associate Director ... 5
Robert B. Costello, Under Secretary of Defense for Acquisition, Department of Defense ... 15
Robert Bedell, Administrator, Office of Federal Procurement Policy, accompanied by Dr. Allan Burman, Deputy Administrator, and David Baker, Associate Administrator for Management Controls ... 21
Hugh Witt, Consultant, United Technologies, former OFPP Administrator, 1974–1977 ... 25
Lester Fettig, President, Fettig, Inc., former OFPP Administrator, 1977–1979... 27
Karen Hastie Williams, Attorney at Law, Crowell & Moring, former OFPP Administrator, 1979–1981 ... 28
Don Sowle, Consultant, former OFPP Administrator, 1981–1985 ... 29
Jean A. Caffiaux, Senior Vice President, Government Division, Electronic Industries Association, Washington, DC ... 32
Clarence T. Kipps, Jr., partner, Miller & Chevalier, U.S. Chamber of Commerce, Washington, DC ... 33
Robert Trimble, Vice President for Contracts, Martin Marietta, Inc., Aerospace Industries Association of America, Inc., Washington, DC ... 34
Colette Nelson, Director of Government Relations, American Subcontractors Association, Alexandria, VA ... 34
C. Stanley Dees, Chairman, Section of Public Contract Law, American Bar Association, Washington, DC ... 35

ALPHABETICAL LIST OF WITNESSES

Bedell, Robert:
  Testimony ... 21
  Prepared statement with attachments ... 55
Bowsher, Charles: Testimony ... 5
Caffiaux, Jean A.:
  Testimony ... 32
  Prepared statement with attachments ... 164
Costello, Robert B.: Testimony ... 15
Dees, C. Stanley:
  Testimony ... 35
  Prepared statement ... 196
Fettig, Lester:
  Testimony ... 27
  Prepared statement ... 137
Kipps, Clarence T. Jr.:
  Testimony ... 33

Kipps, Clarence T. Jr.—Continued Page
Prepared statement 175
Math, Paul: Testimony 5
Nelson, Colette:
Testimony 34
Prepared statement with attachments 187
Socolar, Milton, J.: Testimony 5
Sowle, Don: Testimony 29
Trimble Robert:
Testimony 34
Prepared statement 182
Williams, Karen Hastie:
Testimony 28
Prepared statement with attachments 147
Witt, Hugh:
Testimony 25
Prepared statement 133

APPENDIX

Text of S. 2215 37
Summary of S. 2215 54
Prepared statements of witnesses in order of appearance 55
"Federal Procurement-Related & RDT&E Outlays," GAO chart 201
"Legislation Related to Procurement," GAO chart 201
Letter to Hon. George Bush, President of the Senate from Kathleen A. Buck, General Counsel of the Department of Defense, March 31, 1988 203
Dear Colleague letter from Elmer B. Staats, former Comptroller General and Chairman, The Procurement Round Table, March 5, 1987 215
Letter to Senator Lawton Chiles from C. Stanley Dees, Chairman, Section of Public Contract Law, American Bar Association, February 12, 1988 237
"Summary of Presidential Task Force Meeting," press release from the Office of Vice President George Bush, March 23, 1988 247
Statements from:
The Associated General Contractors of America 249
Financial Executives Institute 252
"A Reconstituted Cost Accounting Standards Board: An Evaluation of Its Necessity, Structure, and Scope," white paper, Public Contract Law Section, American Bar Association, February 8, 1988 256
"Procurement: Assessment of the Office of Federal Procurement Policy," report of the General Accounting Office, November 1987 322

REAUTHORIZATION OF THE OFFICE OF FEDERAL PROCUREMENT POLICY

FRIDAY, MARCH 25, 1988

U.S. Senate,
Subcommittee on Federal Spending,
Budget and Accounting,
Committee on Governmental Affairs,
Washington, DC.

The Committee met, pursuant to notice, at 9:30 a.m., in room SD-342, Dirksen Senate Office Building, Hon. Lawton Chiles, Chairman of the Subcommittee, presiding.

Present: Senators Chiles, Levin, and Bingaman.

OPENING STATEMENT OF SENATOR CHILES

Senator Chiles. The hearing will be in order.

I see a lot of familiar faces in the audience this morning. We were saying earlier maybe we should call this sort of a homecoming. One of my first responsibilities when I came to the Congress in 1971 was to replace Scoop Jackson as a member of the Commission on Government Procurement.

Federal outlays for procurement of goods and services, from paper clips to major weapons systems, was about $55 billion a year. In contrast, that figure has now grown to over $200 billion this fiscal year.

I recall the Procurement Commission was created by Scoop Jackson and Congressman Chet Holifield in the late 1960s to try to help get a handle on large cost overruns in weapons systems and other purchasing scandals that were receiving tremendous public attention.

Senator Sam Ervin, then the Chairman of Governmental Affairs, created a little ad hoc Subcommittee in response to the Commission's work, and that was my first chairmanship. Senator Roth served with me.

The first thing we did was implement the Commission's number one recommendation to establish a high level central manager in the Executive Branch for procurement policy by passing the Office of Federal Procurement Policy Act of 1974. A lot of water has passed over the dam since then. The ad hoc subcommittee led to a permanent procurement jurisdiction in the Committee and together with the Office of Federal Procurement Policy as the vanguard in the Executive, a procurement reform movement was launched and sustained.

The implementation of most of the Procurement Commission's recommendations and the passage of the Competition in Contracting Act, for example, were consequences of this beginning. So were the reauthorizations of OFPP in 1979 and 1983. We deliberately placed a sunset on the authorization supporting the Office of Federal Procurement Policy in order to require Congress to revisit the need for the Office. I sponsored the 1979 exercise. Senator Cohen deserves special mention for his work 5 years later.

From the beginning, Congress envisioned the role of the OFPP to lead, coordinate, simplify and save the taxpayer money in Government contracting. Substituting front-end competition for complex regulations is one mandate. Helping Congress get to a consolidated acquisition law instead of the fragmented situation we still have today is another. Establishing and maintaining a single set of procurement regulations is a major priority. Ridding Government contracting of detailed specifications to make way for more suppliers, innovation, and new technology continues to remain as important today as it was then.

Reducing the paperwork that businesses—particularly small and minority businesses—have to face in order to supply the Government continues to be, I think, the Holy Grail of Government contracting.

These are priorities in procurement policy that still deserve attention. The messages of the Packard Commission in 1986, for example, are remarkably similar to those of the Procurement Commission in 1972. Looking back, the OFPP record is checkered. But in my last year in Congress, and after watching the pendulum go back and forth on this office for some 14 years, I believe the need for a strong OFPP is greater than ever. The bill we discuss today is intended to make OFPP a strong player in procurement policy in the future.

Let me add, the present cosponsors of this legislation have worked together in an attempt to overcome traditional concerns of the Department of Defense regarding this Office. Since the last reauthorization in 1983, the position of Under Secretary of Defense for Acquisition has been created by the Congress. The Under Secretary's mission is to handle, within the Defense Department, similar procurement policy needs that Congress intends the administrator of OFPP to be accountable for Government-wide.

I believe these 1988 amendments to the Act will enhance the ability of both the Administrator and the Under Secretary to accomplish their responsibility.

[Senator Chiles prepared statement follows:]

PREPARED STATEMENT OF SENATOR CHILES

Good Morning, I see a lot of familiar faces in the audience this morning. Maybe we ought to call this a homecoming.

One of my first responsibilites when I came to Congress in 1971 was to replace Scoop Jackson as a member of the Commission on Government Procurement. Then federal outlays for procurement of goods and services, from paperclips to major weapon systems, was some 55 billion dollars a year.

In contrast, that figure has grown to some 200 billion this fiscal year.

Recall the Procurement Commission was created by Scoop Jackson and Congressman Chet Holifield in the late 1960's to help get a handle on the large cost overruns in weapons systems and other purchasing scandals that were receiving tremendous public attention.

Senator Sam Ervin, then the Chairman of Governmental Affairs, created a little ad hoc subcommittee to respond to the Commission's work. That was my first chairmanship. Senator Roth served with me.

The first thing we did was implement the Commission's number one recommendation to establish a high level central manager in the executive branch for procurement policy by passing the Office of Federal Procurement Policy Act of 1974.

A lot of water has passed over the dam since then. The ad hoc subcommittee led to a permanent procurement jurisdiction in this Committee led to a permanent procurement jurisdiction in this Committee and together with the OFPP as a vanguard in the executive, a procurement reform movement was launched and sustained.

The implementation of most of the Procurement Commission's recommendations and the passage of the Competition in Contracting Act, for example, were consequences of this beginning.

So were the reauthorizations of OFPP in 1979 and 1983. We deliberately placed a sunset on the authorization supporting OFPP in order to require Congress to revisit the need for the Office. I sponsored the 1979 exericse. Senator Cohen deserves special mention for his work five years later.

From the beginning, Congress envisioned the role of OFPP to lead, coordinate, simplify, and save the taxpayer money in government contracting.

Substituting front end competition for complex regulations is one mandate.

Helping Congress get to a consolidated acquisition law, instead of the fragmented picture we still have today is another.

Establishing and maintaining a single set of procurement regulations is a major priority.

Ridding government contracting of detailed specifications to make way for more suppliers, innovation, and new technology remains important.

Reducing the paperwork businesses, particularly small and minority businesses, have to face to supply the government continues to be what can be called the "Holy Grail" of Government contracting.

These are priorities in procurement policy that still deserve attention. The messages of the Packard Commission in 1986 for example, are remarkably similar to those of the Procurement Commission in 1972.

Looking back, the OFPP record is checkered. But in this my last year in Congress, and after watching the pendulum go back and forth on this office for fourteen years, I believe the need for a strong OFPP is greater than ever. The bill we will discuss today is intended to make OFPP a strong player in procurement policy in the future.

Let me add the present cosponsors of this legislation have worked together in an attempt to overcome traditional concerns of the Department of Defense regarding this Office.

Since the last reauthorization in 1983, the position of the Undersecretary of Defense for Acquisition has been created by Congress. The Undersecretary's mission is to handle within the Defense Department similar procurement policy needs that Congress intends the Administrator of OFPP be accountable for Governmentwide. I believe these 1988 amendents to the Act will enhance the ability of both the Administrator and the Undersecretary to accomplish their responsibilities.

I look forward to today's testimony.

Senator CHILES. I want to thank Senator Bingaman for the work that he has done in trying to put together amendments to the Act. He heads up the Procurement Subcommittee in the Defense Authorization Committee and has been interested in procurement policy since he came to the Congress. Senator Bingaman has been a leader in trying to provide a better purchasing policy for the Government.

Senator Bingaman, your assistance in helping to work out the differences with the Defense Authorization Committee are tremendously helpful to us and I am delighted that you have this continued interest in procurement policy.

OPENING STATEMENT OF SENATOR BINGAMAN

Senator BINGAMAN. Mr. Chairman, let me just say I am pleased to be an original cosponsor of your reauthorization bill and I know the central role you have played in establishing the Office and keeping it functioning and improving upon it. I appreciate all the work you have done to resolve the issues that have existed with regard to Defense Department procurement and as regards procurement throughout the rest of the Government.

I am glad to be here today and I look forward to the testimony. I have a statement I will put in the record if I may.

Senator CHILES. Thank you. Your statement will be put in the record and we are delighted to have you here.

[Senator Bingaman's prepared statement follows:]

STATEMENT OF SENATOR BINGAMAN

Mr. Chairman, I was pleased to join you yesterday as an original cosponsor of legislation to reauthorize the Office of Federal Procurement Policy. The bill proposes to make several important changes designed to strengthen the overall coordination of procurement policy in the Executive Branch.

I believe that the proposed legislation is an excellent vehicle for further deliberations by the Senate on this important function. I commend you for carefully consulting with a broad range of Senators with a potential interest in this legislation in the course of developing it. The list of original cosponsors reflects a vote of confidence in your long-term leadership in this area.

I look forward to the testimony today from the Undersecretary of Defense for Acquisition Dr. Robert Costello, the current Administrator of OFPP, Mr. Robert Bedell, the Comptroller General, Mr. Charles Bowsher, and panels of former OFPP administrators and industry witnesses. While I think we have a very good vehicle for further action, undoubtedly we will want to make some adjustments following our review of the testimony.

Let me note that I paid particular attention to the need for the reestablishment of a Cost Accounting Standards Board function in the development of this legislation. The legislation establishing the earlier Cost Accounting Standards Board is constitutionally defective in several respects. The need for further action on cost accounting standards has become more evident as the years have passed since the previous Cost Accounting Standards Board ceased to function. The proposed legislation sets up a board within the Office of Federal Procurement Policy consisting of five members. The OFPP Administrator will serve as chairman of the board. One member shall be appointed by the Administrator of the General Services Administration, one by the Secretary of Defense, and two by the OFPP Administrator from private industry and the accounting profession respectively.

The proposed legislation gives the OFPP Administrator, after consultation with the board, the exclusive authority to make, promulgate, amend, and rescind cost accounting standards designed to achieve uniformity in the allocation of costs to government contracts. While we have chosen this approach in the draft legislation, we may need to consider other alternatives at the upcoming hearing such as vesting the full board with the authority for cost accounting standards. So I look forward in particular to the testimony on how to improve the proposed section of the bill dealing with the Cost Accounting Standards Board at our upcoming hearing.

Mr. Chairman, let me conclude by noting that the last time the reauthorization of the Office of the Federal Procurement Policy came before the Senate, there were significant substantive differences between the Armed Services Committee and the Governmental Affairs Committee over the legislation. As Chairman of the Defense Industry and Technology Subcommittee of the Senate Armed Services Committee, which obviously has a profound interest in the defense acquisition system, and as a member of this Subcommittee, I want to commend you, Mr. Chairman, for working so diligently to resolve such problems in the legislation before us today.

Senator CHILES. Senator Nunn and Senator Levin are also original cosponsors and we are delighted to have their help.

Our first panel of witnesses are, as anyone would know they would be, the General Accounting Office. From the time of the Commission Procurement Commission the General Accounting Office was the mainstay of work done on the Procurement Commission and has been in all of the actions towards the authorizing

Office of Federal Procurement Policy and trying to make that policy work.

General Bowsher, we want to thank you again for your report on OFPP. It is very helpful. Elmer Staats served with me on the Procurement Commission and he taught me a lot about nuts and bolts and GAO has had such a large role in creating OFPP. We always appreciate the attention and resources that the General Accounting Office has dedicated to Government procurement policy, and we are delighted to have you with us today, and your people.

TESTIMONY OF CHARLES BOWSHER, COMPTROLLER GENERAL, GENERAL ACCOUNTING OFFICE, WASHINGTON, DC, ACCOMPANIED BY MILTON J. SOCOLAR, SPECIAL ASSISTANT TO THE COMPTROLLER GENERAL, AND PAUL MATH, ASSOCIATE DIRECTOR

Mr. BOWSHER. Thank you very much, Mr. Chairman and Senator Bingaman. It is our pleasure to be here and we appreciate the opportunity to testify in support of the legislation reauthorizing the Office of Federal Procurement Policy.

As part of our continuing effort to assess operations at selected central management agencies and in anticipation of reauthorization hearings, we performed a review of OFPP and issued a report in November of 1987. Today I would like to highlight our results. I will also address the proposed legislation to reauthorize OFPP.

As envisioned by the Commission on Government Procurement, OFPP was to play a vital role in achieving greater economy, efficiency and effectiveness in the Federal procurement process. In 1974, the Congress responded to increasing criticism about the complexity and poor management of Federal procurement by creating OFPP. The Office was to provide Executive Branch procurement policy leadership and coordinate Federal procurement policies.

We believe that OFPP should play an important role in achieving greater efficiency and effectiveness in the Federal Government's procurement process. OFPP's role is even more important today considering the significant increase in Federal outlays for procurement, research and development and the large amounts of procurement-related legislation that has been introduced since OFPP's creation.

Chart 1[1] shows that in 1974 the Federal budget outlay for procurement, research and development was approximately $97 billion, and the estimated outlay for fiscal year 1988 is approximately $159 billion in constant 1982 dollars.

The volume of the procurement-related legislation introduced for a given Congress is significant and OFPP should play a leadership role in developing and coordinating the appropriate responses to emerging procurement concerns of the Congress.

As shown in chart 2, the numbers of procurement-related bills introduced have ranged from 129 to 318. The most recent Congress had 157.

Our review of OFPP included obtaining a broad range of views from the procurement community about OFPP's performance. We obtained this information through a questionnaire completed by Government procurement executives and representatives of private industry who had extensive experience in Government procurement.

---

[1] The charts referred to by Mr. Bowsher throughout start on p. 201.

OFPP's performance, despite notable achievements such as implementing the Federal Acquisition Regulations, was considered by many members of the procurement community to be no more than marginally effective. These experts identified factors that they perceived as contributing to OFPP's uneven performance. The primary factors identified by the experts were, one, the lack of strong management and leadership at OFPP; two, inadequate support from the Office of Management and Budget; and three, a lack of staff resources.

Some believe, and we agree, that lengthy periods without an appointed administrator contributed to OFPP's uneven performance. As shown in chart 3, during OFPP's 14-year existence, it has functioned without an appointed administrator for a cumulative period of 3 years.

This relatively long period without an administrator is indicative of the lack of commitment to the jurisdiction of OFPP.

Senator CHILES. That is almost a fourth of its time that it has been without an administrator.

Senator BINGAMAN. A fourth of its time. That is right, Mr. Chairman.

Now, we believe that effective and dynamic leadership and the full support of OMB are critical ingredients to the success of such a small central office. The director of OMB should ensure that the position of OFPP Administrator does not remain vacant for long periods.

Despite the express concerns over OFPP's performance, both Government and private sector experts support the reauthorization of OFPP and believe that OFPP can improve the effectiveness of the Government's procurement system. They also believe that central leadership is needed to address the many remaining procurement problems.

They identified OFPP as the agency that could best provide this overall direction and leadership. In addition, most believe that OFPP can effectively perform this role as part of OMB while others do believe that it should be an independent Federal agency.

Our overall conclusion was that OFPP should remain in OMB. We agree with those who argued that linkage to OMB is necessary to provide OFPP the required prestige and clout to get things done.

Now I would like to address some of the other areas included in the reauthorization legislation being considered by the Subcommittee. First is the creation of the Federal Acquisition Regulatory Council; second, the reestablishment of the Cost Accounting Standards Board; third, the requirement for the OFPP administrator to do a study for a consistent methodology that executive agencies should use for measuring Government contractor profitability.

The proposed legislation would create the Federal Acquisition Regulatory Council consisting of the OFPP Administrator and a procurement executive from the Department of Defense, the General Services Administration, National Aeronautics and Space Administration. Basically, this Council would assist in the direction and coordination of procurement regulatory activities in the Federal Government.

We think that the creation of the Council may assist the OFPP Administrator in more effectively performing its functions by providing a link between the various procurement executives. We believe that the Council might well help to ensure a more coordinated and streamlined approach in the development of procurement policies and regulations.

Next is the Cost Accounting Standards Board. Since the original Cost Accounting Standards Board's termination on September 30, 1980, we have consistently advocated that a cost accounting standards setting authority be reestablished. It is important that an appropriate authority be designated to make, issue, amend, rescind and interpret cost accounting standards. We believe that OFPP is the logical choice for performing these functions.

Therefore, we support the proposed legislation which would assign duties and responsibilities previously performed by the Cost Accounting Standards Board to the OFPP Administrator.

However, we do have a few recommendations concerning the proposal. Specifically, we suggest, one, the language relating to CASB applicability be clarified because the proposed provision is broader than the previous law. For example, contracts where prices are set by law or regulation appear to be covered. We will be happy to work with the Subcommittee in developing the appropriate language.

Two, the initial term of office for each Board member should be individually time-phased so that all members terms do not end at one time. This will avoid a problem that the original Board faced. Three, the Board members who are not officers or employees of the Federal Government should receive compensation at the executive level IV. These previous board members were assigned at the level IV, rather than at the lower level V proposed by the new legislation.

We note that other bills dealing with the cost accounting standards have combined allocability with allowability. We believe that it is important to separate the cost allocability standards and the cost allowability principles. Allocability is an accounting issue and allowability is a procurement policy issue.

Allocability and allowability traditionally have been viewed as separate concepts serving distinctly different objectives. In reestablishing a Cost Accounting Standards Board, we believe this distinction should be maintained and support this vital distinction.

The last item is the profitability reporting program. The legislative proposal contains a requirement to develop a consistent methodology that executive agencies should use for measuring the Government contractor profitability. We agree with this provision and are currently working with representatives of DOD and OFPP towards accomplishing this requirement.

While we support this step towards identifying the various factors needed to measure profitability, we want to emphasize that specific legislation is required to institute a mandatory profitability reporting program.

We issued a report back in September of 1987 that provides a framework for a profitability reporting program that would require consistent analytical methodology to evaluate profitability. Our proposal would allow the Government to gather data and study aggregated contractor profitability on a regular and consistent basis for the first time. Our report contains suggested legislation to require major Government contractors to report financial results annually to the OFPP Administrator.

Over the past several years a number of statutes, regulations and management practices have been initiated to improve the defense procurement process. Many of these practices may affect a contractor's profitability. Recently, the defense industry has been outspoken about certain defense procurement policies, such as; one, cost sharing on new development programs; two, the new defense profit policy; three, lower progress payments; four, revised special tooling investments; five, revised cost recovery principles; and six, tax law changes.

Currently, sufficient data are not available to measure the full impact of these various factors on actual contractors' profitability and a Profitability Reporting Program like the one that we have proposed I believe would correct this very real deficiency.

We believe that the lack of information that currently exists is a disservice to the contractors who may well have their financial health significantly impaired by various defense policies. We also believe it is a disservice to the DOD policy-makers who must make decisions with little or no data on which to assess their impact.

We recognize that there are industry concerns over establishing a mandatory program for reporting profit data, but these should not be insurmountable. If the Congress, the defense industry, or others believe that modification of our proposed legislation is required before enactment, we will be happy to work with them to develop this legislation and to address any concerns that might be raised.

Mr. Chairman, this concludes our prepared remarks and we would be very happy to answer any questions.

Senator CHILES. Thank you very much. You have a very comprehensive and helpful statement and we certainly look forward to working with you in trying to even further improve the legislation we have introduced. It seems to me the most important point you make is the success of OFPP depends on whether the President of the United States wants it and supports it and, of course, his designee, the director of OMB.

Mr. BOWSHER. I think that is right, Mr. Chairman. It has been a real problem, I believe, over there in the last 14 years that too often the OMB director, and I think many of the senior people at OMB, just do not understand procurement and the important related issues, even though there is really big money involved. Billions of dollars are involved. I think the Congress established OFPP to help and it is disappointing that OMB has not understood this assistance that was given to them.

I can assure you that when the next Administration comes in, we are going to work with OMB to explain OFPP's vital role.

Senator CHILES. I hope you can. I think that is tremendously important. I have constantly felt that we have a misnomer in that office. We ought to take the "M" out of there if they do not see their role as being "management" and budget, and here is a tremendous tool toward management and it has not been utilized.

Mr. BOWSHER. I could not agree more. I testified before another Committee a while back and said, you know, the "M" of OMB just has not worked, and it has not worked to a great extent because of the attitude over there at OMB. And so OFPP is not too much different.

Senator CHILES. And we can say that in a nonpartisan way because that has been through Democrats and Republicans, has it not?

Mr. BOWSHER. That is exactly right.

Senator CHILES. Well, I think that is just a tremendously strong and valid point and, of course, as you know, as far as an organizational chart goes it would be better if it was an independent agency. We felt that on the Procurement Commission back in the early 1970s, but knew without some clout the agency would have no effect. And so we knew it had to operate under the Office of Management and Budget and we see even under there it gets lost.

But I think we can see what would happen as an independent agency stuck off with no voice to the top. It would have no clout at all.

Mr. BOWSHER. We agree with that.

Senator CHILES. Section 3 of our bill intends to clarify the present authority of the Office of Federal Procurement Policy to initiate as well as to respond to changes in procurement policy regulations procedures and forms.

Do you support that provision?

Mr. BOWSHER. Yes, we do support that as a clarification.

Senator CHILES Well, the other question that just came to my mind, in the questionnaire you sent out, from what I heard you say, I did not hear you say that many of the people, whether they were in the contractor side or in the Government side, thought that the idea was wrong. They really felt that the implementation or whether it was recognized was where the fault was.

Mr. BOWSHER. I think that is correct. I think everybody was hoping for more success over the last 14 years. Everybody believed we should continue to have it and are hoping really for more success in the future. That is really what it comes down to.

Senator CHILES. Your comment on the legislative proposals on procurement the Executive Branch has to respond to is a good one. This is an area where OFPP can serve both an Administration and Congress. There are a number of us in Congress who feel strongly there is a need to bring some stability to the number of changes that we are fostering on the procurement system.

As you have seen, over the years we tend to get in and try to micro-manage because we are frustrated at what we see and some of the scandals and problems in the overall thing where that is exactly the wrong way and it turns out to be counterproductive every time.

Mr. BOWSHER. I believe, Mr. Chairman, it would be much better if we did not have to legislate as much as we seem to be doing, but it is as a result of that frustration. In other words, I think the Congress is just constantly being served problems here that they feel they have to do something about. If we could have a more successful procurement policy and implementation in the Executive Branch, I think we could reduce the number of legislative proposals. And I think OFPP is key to try to achieve this, myself.

Senator CHILES. The administrator of OFPP is presently a level 4 in the Executive schedule. What is your opinion as to whether it would help if you made the Office a higher level? For example, the newly created Under Secretary of Defense is a level 2.

Mr. BOWSHER. I am not sure that that would help a lot. I think it is more the relationship of the director of OFPP with OMB, and you have level 2 and a level 3 there as the director and the deputy director. I am not sure that changing the level is necessary, myself.

Senator CHILES. I am delighted to hear your support for the regulatory council provisions. One of my aspirations has been to try to build a better bridge between the agency responsibilities under the Paperwork Reduction Act and their responsibilities under the OFPP act.

Do you support the provision that members of the regulatory council be responsible to ensure that the public requirement comments of both OFPP and the Paperwork Act are coordinated and complied with?

Mr. BOWSHER. Yes, we do.

Senator CHILES. Well, again, I want to thank you and your Agency, Mr. Math and Mr. Socolar, for all of your help in this. It has been tremendously helpful to us and we appreciate it very, very much.

Mr. BOWSHER. I might also say, Mr. Chairman, that some of the members of the staff of the GAO asked me to say a few words here about what a great pleasure it has been to work with you over these past few years. We are not sure how many more times we will be over here testifying before you, but it has been a great pleasure for GAO to work for you on these procurement matters.

Senator CHILES. Please give them my best. I have enjoyed that relationship very, very much. You all have always been tremendously supportive of us in the Congress and we thank you very much for that.

Mr. BOWSHER. Thank you.

Senator CHILES. Senator Bingaman?

Senator BINGAMAN. Mr. Chairman, I did not have any questions of the witness right now.

Senator CHILES. Senator Levin, we are delighted—as I announced earlier—to have you as an original cosponsor of the Act. You are going to be inheriting these roles, I hope, to continue trying to push this. And we are delighted with your interest, and as it has been over the years, in a strong procurement policy and contracting policy for the Government.

OPENING STATEMENT OF SENATOR LEVIN

Senator LEVIN. Thank you, Mr. Chairman. I thank you for your leadership in this effort. We are all going to miss you deeply, not just in this area but across the board. Let me join also in the comments about your staff as well. They have been very easy to work with my staff. We appreciate that. If I were sitting out there I would be shedding a few tears, too, appearing in front of you perhaps for the last time.

Mr. Chairman, I have a statement that I would appreciate being made a part of the record.

Senator CHILES. It will be made a part of the record.

[The prepared statement of Senator Levin follows:]

STATEMENT OF SENATOR LEVIN

In the late 60's and early 70's there was a growing concern that an increasingly complex Federal procurement system lacked effective management control. In 1974, the Congress created the Office of Federal Procurement Policy (OFPP) to fill this void in overall leadership and direction in how the Government goes about buying goods and services. Senator Chiles played a vital role in the establishment of this office. I have been a strong supporter of the office since I have been in the Congress. Senator Cohen, when he served as chairman of the Senate Subcommittee on Oversight of Government Management, was firmly committed to a strong OFPP and successfully guided the last OFPP reauthorization to enactment.

Since the creation of the office, particularly in the last 6 or 7 years, we have seen an enormous amount of activity in the procurement arena. There has been intense scrutiny of the entire process which identified the need for many changes in the way the Government does business. During this period we have often looked to OFPP for guidance through this dynamic environment. The questions to ask are—has OFPP responded in a manner that has resulted in a more efficient and effective procurement process, and—can the office do more toward this end?

I think the answer to both questions is yes.

OFPP has played a role in helping competition emerge as a desirable goal rather than the rare exception. The issuance of the Federal acquisition regulation is also an accomplishment of note. However, these, and many other areas of procurement policy deserve, even demand, further improvement. OFPP, given proper staffing and support from the director of OMB, can be an important player in bringing about needed improvements in how the Government spends our tax dollars to buy goods and services.

We are here today to consider several changes to the authorities and functions of the office. One of the most important of these is the re-establishment of the cost accoutning standards (CAS) board within OFPP. This is an extremely important function since these standards have a significant impact on literally hundreds of billions of procurement dollars.

In 1980, convinced that the original CAS board had adequately addressed the major issues of proper cost accounting, the Congress decided not to provide additional funding for the board. This left the Government contracts community with 19 mandatory cost accounting standards, but no entity with the authority to issue new standards, update existing standards, or grant waivers and exemptions.

Since that time, there has been a growing body of opinion that questions the wisdom of the decision to eliminate the CAS board function. While there is a wide variety of views as to the organizational placement, structure, and authority of a new CAS board, there now is concensus as to the need for such an entity.

We have before us a provision in this reauthorization bill that would establish a new CAS board within OFPP with the same authority as the prior board. I realize that we will hear from a number of witnesses today who will advocate an expansion of this authority to include cost principles—that is those rules that ensure that costs are reasonable and in the public interest. However, others feel, including myself, that the prior board's success at creating fundamentally sound accounting standards that showed neither bias or prejudice toward either contracting party, was due, in large measure, to keeping policy issues concerning the "allowability of costs" separate and apart from the accounting issues concerning the "allocability of costs." In addition, the organizational placement of the new board within OFPP will eliminate any of the constitutional questions that plagued the prior board.

Mr. Chairman, I am pleased to be a co-sponsor of your bill to reauthorize OFPP. It is a strong bill which responsibly addresses several important issues. I also appreciate the willingness of your staff to work with my office on the issues of particular concern to me, and I commend both staffs for their ability to put together a solid piece of legislation.

I look forward to hearing from our witnesses on all the many and varied issues facing the subcommittee regarding this reauthorization. Thank you, Mr. Chairman.

Senator CHILES. Senators Glenn, Pryor, and Heinz, have opening statements we will make part of the record.

[The prepared statements of Senators Glenn, Pryor, and Heinz follow:]

OPENING STATEMENT OF SENATOR J. GLENN

I appreciate the efforts of Senator Chiles in Drafting legislation to reauthorize the Office of Federal Procurement Policy (OFPP) and to give it increased authority.

Back in 1974, the Congress created OFPP to provide executive branch procurement policy leadership and to coordinate Federal procurement policies and practices. OFPP was initially authorized for 5 years and was subsequently reauthorized in 1979 and 1983. OFPP's most recent authorization expired on September 30, 1987. OFPP is currently operating under the continuing resolution. We need to get on with not only reauthorizing OFPP, but to also give it the necessary teeth with which to effectively carry out its charter.

Since 1974 when OFPP was created, we have seen its powers legislatively diminished and its leadership left uncertain. As a result, OFPP's performance has at times been uneven. Criticism has been made that OFPP lacked strong management and leadership, received inadequate support from OMB, and lacked staff resources.

OFPP should be the driving force to simplify and protect a single Government wide set of procurement regulations. Both Government and private sector officials believe that a central procurement policy-making office is needed to oversee Government procurement, and they support the reauthorization of OFPP.

I believe that the legislation drafted by Senator Chiles is a step in the right direction. It will assist in overcoming the criticisms levelled at OFPP and will help to restore OFPP to its intended role of being the driving force in providing overall procurement policy direction in the Federal Government.

OPENING STATEMENT OF SENATOR PRYOR

Thank you, Mr. Chairman. I appreciate your allowing me to drop by today. Although I am not a member of your Subcommittee, I do have a vital interest in our government's procurement practices, and therefore, in the reauthorization of the Office of Federal Procurement Policy (OFPP).

I want to thank you again for the leadership you are showing in this critical area. Your legislation to reauthorize OFPP represents an outstanding effort to create a stronger and more effective OFPP. I certainly want to work with you on this measure in the coming weeks.

Of particular interest to me, Senator Chiles, is the question of whether or not sufficient management controls are in place to control billions of dollars of consultant or advisory services contracts. I think the answer is a resounding "NO". For the record, I do plan to hold hearings in the coming months in the Federal Services Subcommittee—which I chair—to examine this issue in more detail.

One issue I'm troubled with in connection with the government's purchase of advice is the integrity and usefulness of the Federal Procurement Data System (FPDS), the data bank which provides information to those who are interested—including Members of Congress—about the characteristics of government contracts. It is my experience that this system is currently of little use in terms of actually determining how much is being spent by the government for advice. I am convinced, unless we have a reporting system that we can count on to provide reliable data, Congress will never really know what is going on in what has been referred to as a "shadow government."

I wanted to stop by today to make the Administrator aware that there are some of us in Congress who have serious concerns about this issue. It seems proper to me that the office charged with providing overall direction for procurement policies of the federal government be sensitive to this kind of government contracting. Frankly, given all I have seen, I'm unsure of how this problem fits into OFPP's priorities.

Over the past few weeks, my staff has been involved in a dialogue with OMB and OFPP. During these communications, they have been made aware of the new OMB Circular A-120, which seeks to redefine what were previously "consultant" contracts, and are now "advisory assistance contracts."

Although I believe OMB is moving in the right direction by broadening the definition of contracts which involve selling advice to the government—which by the way, will result in a truer picture of the billions of dollars spent in this area, rather than the millions which are currently being reported—I'm still concerned about the commitment of OFPP to the issue. For example, my staff has been told that only one person at OFPP is involved in the implementation of the new circular!

Mr. Chairman, billions of dollars are being spent under the contract actions which fall within this Circular and one person is responsible for all Congressional inquiries! This is incredible and dismaying.

Thank you again, Mr. Chairman, for allowing me to stop by. I think it particularly appropriate—as April 15 rapidly approaches—to make sure that each taxpayer dollar brings the greatest possible return. I will work with you, Senator Chiles, to ensure federal procurement is competitive, vigorous, and no-nonsense. Taxpayers will accept no less.

OPENING STATEMENT OF SENATOR HEINZ

Mr. Chairman, I commend you for your efforts to improve Federal procurement policy. The office of Federal Procurement Policy has been without an authorization for months, and one is needed if we are to have a centralized office to improve Government purchasing.

Businesses all over the country have been sudsidizing the Government's tardiness in paying its bills for too long. It's tough enough for a company to compete in a complex economy without having to carry the Government on the books. An effective OFPP is badly needed to bring order to current policy.

Procurement improvements can only enhance the Government's reputation as a sound business partner. The committee, in approving the Prompt Pay Act Amendments, has tried to improve Uncle Sam's reputation as a dead-beat. Ineffective management and payment practices will only serve to deter the very best service providers from doing business with the Federal Government.

Mr. Chairman, you bring to this issue many years of experience regarding Federal procurement. I look forward to working with you on this issue, and to reviewing today's testimony. Thank you, Mr. Chairman.

Senator LEVIN. I just have a few questions for Mr. Bowsher.

You have testified, I believe, in favor of the provisions in our bill which would establish a new Cost Accounting Standards Board within the Office of OFPP. I have two questions about that.

One, why do you believe that it is appropriate to establish the board with the OFPP? And the second question is, can you give us some examples of the type of problems that we are likely to experience with our current cost accounting standards if we fail to establish a new board?

Mr. BOWSHER. The reason you need a Cost Accounting Standards Board or some kind of an independent group working on that issue is because things change. In other words, the Congress created the Cost Accounting Standards Board back there and they were in operation for a decade and they set in place the standards based on the information at that time and how the world worked.

Today we have changes. In other words, in the pension area you have had different financial accounting standards issued, in foreign selling costs, in many of the things that have to do with the international thing that the defense area is much more into today than they were when the Cost Accounting Standards Board went out of being.

So it is not that we think a lot of new standards have to be developed in this cost accounting area. What we really think is that you have to have some organization in the Government that can amend them, change them as events take place, and I think that what you are having now is people who just have to make do without having this kind of guidance.

So I think the function is needed, and if you are going to need this function, the best place we can think of is the OFPP because it is Government-wide, not just DOD contracts, and where it used to be over in my shop, I think with the decisions that came down from the Supreme Court recently, why, it probably is better to have it in the Executive Branch rather than in our shop.

Senator LEVIN. The House bill, or the OFPP reauthorization bill that is pending before the House, contains a standards-of-conduct section that is not included in our bill. The House bill would require certifications of ethical conduct by a contractor and Government employees before the Government can award any contract for property or services. And it is that House provision that I want to ask questions about now.

What practical problems do you see, if you do see any, with the standards-of-conduct provisions in the House bill?

Mr. BOWSHER. We are a little worried that the House bill will create undue red tape and paperwork. We recognize that we have had some real problems in this area, I wonder if there is not a way of dealing with it that might not be as paperwork oriented, you might say, as what the House amendment indicates.

Our staff is still looking at it and we would be willing to get with your people and discuss it further. But that is our initial concern.

Senator LEVIN. All right. Would you give us any further thoughts that you have on that. I think it would be useful. It would be an issue in conference that perhaps we would like your thinking on it.

Mr. BOWSHER. Yes.

Senator LEVIN. You talked about the paperwork burden, which is also a concern of some of us in not getting an adequate improvement in integrity in exchange for that burden.

Can you tell us approximately how many contract actions would be covered by the provision in the House bill and how many certifications would be required by the House bill?

Mr. BOWSHER. I believe our best number right now is something like 15 million procurement actions, based on the 1987 data. And so that is a very large number and that is one of our concerns.

Senator LEVIN. How many certifications would be required? Is that the same number?

Mr. BOWSHER. We are not sure. We better check that. We think it might be close to the same number.

Senator LEVIN. Well, it would be a multiple, I presume, because of every individual involved in each of those procurements.

Mr. BOWSHER. That is right; yes.

Senator LEVIN. So then the question is, on the average, how many individuals——

Mr. BOWSHER. Oh, I see. How many individuals. Okay. We will do some checking on that and include that in our answer.

Senator LEVIN. If there are five individuals on the average involved in each procurement, it would be about 15 million you say?

Mr. BOWSHER. Something like that.

Senator LEVIN. Times 5?

Mr. BOWSHER. Yes. But let us do some checking.

Senator LEVIN. Moving now past the certification provisions, are the standards of conduct in the House bill new requirements or are the duplicative of existing requirements?

Mr. SOCOLAR. Much of what is in the House bill is in fact covered by current statute. Title 18 covers a great deal of what is covered in the House bill and in general I would say there is a lot of duplication.

Senator LEVIN. Thank you.

That is all the questions that I have, Mr. Chairman.

Senator CHILES. Well, we thank you all very much for your testimony and your appearance here today.

Our next witness will be Dr. Costello, the Under Secretary of Defense for Acquisitions.

Good morning, Mr. Secretary. We are delighted to have you with us.

TESTIMONY OF ROBERT B. COSTELLO, UNDER SECRETARY OF DEFENSE FOR ACQUISITION, DEPARTMENT OF DEFENSE

Dr. COSTELLO. I have a relatively short statement and because of the significance of the effort that we are looking at, I would like to read through it rather rapidly, if I may.

Senator CHILES. Very good, sir.

Dr. COSTELLO. I am pleased to appear before you today to restate the views of the Department of Defense on the reauthorization of the Office of Federal Procurement Policy. As you may recall, my predecessor testified on this issue last year.

We endorse a straightforward reauthorization of OFPP with their current authorities which include: providing overall direction of procurement policy and leadership in the development of procurement systems of the executive agencies; resolving differences among the procurement regulatory agencies on matters of policy, prescribing policies in such situations when considered necessary; and taking the lead in working with the Office of Personnel Management in improving the procurement workforce, training, performance activities, career requirements and career enhancement.

Recently, within this role, OFPP has become more active in developing well coordinated Government-wide positions on procurement legislation. For example, drafting legislation to authorize commercial-style acquisition of items for use throughout the Executive Branch and proposing legislation to permit the waiver of acquisition laws for the purpose of conducting tests. I happen to be aggressively pursuing tests in a wide variety of activities that could be enhanced by that particular permission.

We also appreciate their efforts to secure Government-wide coordination and gain approval for some of my Department's legislative initiatives to streamline and improve the defense acquisition process. With their help, a package of our legislative proposals will soon be forwarded to the President of the Senate and the Speaker of the House.

It includes proposals to provide for competitive prototyping for subsystems where it is cost effective and revises reporting content requirements supporting decisions on using competitive prototyping; and authorizes the negotiation of small business subcontract plans, applicable to a corporation as a whole or to one or more of its divisions or operating segments, rather than requiring negotiation on an individual subcontract plan.

We believe that OFPP can substantially contribute to the development of policies and programs to enhance the effectiveness of the Government-wide acquisition workforce and to evaluate the impact of various socio-economic programs on the procurement process. There is no area in greater need of attention than efforts to improve the effectiveness of the procurement workforce.

Promotion standards need to be agreed upon and set; training programs need to be reviewed, modified, or created; and compensation, performance and career plans need to be developed. These efforts must be accomplished in conjunction with the Office of Personnel Management. The DOD has moved ahead in this area. Government-wide initiatives would benefit from the strong involvement and leadership of OFPP.

If OFPP is to become even more effective, it must remain within the OMB to influence legislation and those major policy issues with broad, Government-wide application. OFPP should be the focal point for the acquisition community in dealing with these kinds of interagency legislative and policy matters and should consist of a relatively small number of procurement experts, senior grade levels who are directed by a Presidential appointee.

OFPP should be reauthorized and should play a constructive role in the procurement process. However, the amendments to H.R. 3345, as approved by the House Government Operations Committee on September 29, 1987, make a number of substantive changes to OFPP's authorities and responsibilities. This greatly concerns me because it removes authority that is essential to the effective performance of the position of Under Secretary of Defense for Acquisition.

Procurement, the process of purchasing equipment, supplies and services is an essential function of the Department of Defense, an operational activity, a line job. Procurement regulations define how we perform our procurement function in the largest procurement organization in the world. The Department of Defense processed more than 15.3 million contract actions with a total value of $156.5 billion in 1987. This is greater than 75 percent of the total value of all contracts awarded by the Federal Government.

I believe that Congress clearly recognized the overwhelming magnitude of the DOD procurement function in establishing the position of Under Secretary of Defense for Acquisition. Congress endowed that position with the authority to exercise such powers required to establish policies for acquisition, including procurement; research and development; logistics; developmental testing; contract administration for all elements of the Defense Department, and direct authority over the Service Secretaries in acquisition matters.

This is consistent with a generally recognized management principle that responsibility must be closely connected to the authority to fulfill such responsibilities. You have to have the people responsible for the job establishing the policies and regulations necessary to accomplish that job.

If this Congressional mandate to manage the Department's acquisition responsibilities is to continue to be fulfilled, such authorities should not be diminished or assigned to other agencies.

The amendment to H.R. 3345 would expand the authority of the administrator of OFPP to issue procurement regulations, and through these regulations, define how the Department of Defense will fulfill its procurement responsibilities required for the accomplishment of our basic mission. We believe that OFPP's current authority is sufficient.

The amendment to H.R. 3345 also establishes a Cost Accounting Standards Board within the OFPP and gives the board and the administrator of OFPP the authority to establish not only cost accounting standards, but also cost principles that define what costs will be paid on defense contracts. Furthermore, OFPP would become the exclusive enforcement authority for rules and regulations implementing the cost accounting standards and cost principles with authority to recover excess costs resulting from violations. While we are willing, in concept, to support uniform Government-wide cost accounting standards, we cannot fully support this proposal.

In effect, the amendment to H.R. 3345 splits the authority for defining how our procurement mission is to be accomplished from the responsibility and accountability for the mission itself. This is intolerable and will greatly diminish the ability of the Office of the Under Secretary of Defense for Acquisition to fulfill its procurement responsibilities and, as a result, greatly inhibit the ability of the Department of Defense to perform its basic mission which is the defense of our Nation.

I have had generally good relations with the OFPP Administrator. In fact, we think they have been improving rapidly over the past year. While we will not always agree, and we have not always agreed, our differences have been resolved in an amicable fashion when both sides made the effort and sat down and communicated.

In conclusion, I would just like to say that I understand, Senator, that you have recently introduced legislation on this subject. We have not officially received the bill and have not yet developed an Administration position, but we would be glad to review it and work with your staff.

That concludes my statement.

Senator CHILES. I thank you, Dr. Costello. I hear you making a strong statement in support of reauthorization of OFPP and I think that is great. I also hear that you did not make any negative comment about my draft bill, and I understand my staff has provided your office earlier this week with that. Maybe you have not received it officially but I take that as being great.

I also heard you endorse Government-wide accounting standards but expressed concern over a cost accounting board that covers cost principles, as well as accounting standards, and had exclusive enforcement authority. As you know, our proposed board takes care of those concerns.

So I am just going to assume that the Department has few problems with the board we have proposed.

Do you have any objections to our regulatory council proposal?

Dr. COSTELLO. We have not looked at your bill, sir. I would really like to take some more time to study it before we make a comment.

Senator CHILES. Very good. Dr. Costello, I am not going to get into a discussion with you over whether language in another bill does or does not expand the authority of the administrator of OFPP to issue regulations. Let's not do that.

Let me say, I do not agree the language I first put in the statute in 1974 and which was there for 5 years between 1974 and 1979 would expand the present authority. That is the language, by the way, the Senate ratified both in 1974 and in 1979. And in 1983, if you will review the record, you will find that Senators Cohen, Levin, and Tower, at that time, and myself agreed on the Senate Floor that regulatory authority had been restored to OFPP.

That 1974 language created quite a debate in 1983 when this Committee went back to it and former Secretary Weinberger objected to it. I always felt the debate was much more symbolic than it was substantive.

What I do want to do this time around is focus on the substance. I do want to ask you about the language of my bill. Section 3 of the bill clarifies what the administrator of OFPP's authority is to initiate as well as to respond to changes in procurement policy, regulations, procedures and form. Its intent is to have Congress end any confusion about what the existing authority is.

I worked with Senator Nunn to develop this language. Senator Bingaman and Senator Levin have reviewed it. If you or your Department have any problems with this particular amendment we will need to know.

Dr. COSTELLO. We would like to review the clarification and get back to you with our concurrence or any concerns we might have.

Senator CHILES. Fine. I appreciate your noting OFPP's help in putting together a package of your legislative proposals. One of the major newspapers reported the Department initially recommended DOD be exempted from the Paperwork Reduction Act.

I had a little something to do with that law and I take it since your arrival, the Department has changed its mind. The Department of Defense, I understand, supports the reduction of paperwork faced by businesses in the acquisition process; does it not?

Dr. COSTELLO. You can put it on the record, Mr. Chairman, that I hate paper.

Senator CHILES. Good.

Dr. COSTELLO. I have an awful lot on my desk. I would like to tell you a very brief story. When I took over procurement responsibility for General Motors, the guidelines for running the acquisition activities was 154 pages. I gave them a target of 10. We ended up with 13 pages to run all General Motors acquisition efforts.

I was interviewing a General from the Air Force for a job and he said, "You cannot run an organization with only 13 pages." I said, "We are." He said, "I have 3,650 pages," and I said, "General, you cannot run an organization with 3,650 pages."

We have a very active effort to reduce regulatory constraints so we can do away with paperwork.

Senator CHILES. Well, I am delighted to hear that. I once said, when we passed the Paperwork Reduction Act, that I hoped that someday maybe they would be able to put on my tombstone: "He helped reduce paperwork."

As I leave here I do not think that that would be fitting. I do not think that I could claim anything like that, and I hope that I am not ready to engrave that at this stage, too. [Laughter.]

Dr. Costello. I will take part of the baton, if you will, and carry on your crusade.

Senator Chiles. Good. That would be great.

A major difference between the 1983 authorization exercise and this year's is the creation of your Office in 1986. I think that was one of the more important steps that we have taken around here. I certainly support the Congressional creation and I think all of us would be concerned if our bill hindered rather than helped you get your job done.

You have a sympathetic audience here if you develop that kind of concern. We look forward to having a strong OFPP and we want one that will work. I understand this is the second time you have testified before this Committee this week, and after you get comfortable in your new job I think you will find the members of this Committee nice folks and we will look forward very much to working with you, and we expect to.

Senator Bingaman?

Senator Bingaman. Thank you, Mr. Chairman.

Mr. Secretary, let me first thank you. I gather your Office got us some responses to some of the suggested changes in procurement laws that had been sent out earlier by the Armed Services Committee, and we appreciate that.

I notice in your testimony you indicate you got a package of legislative proposals which will soon be forwarded to the President of the Senate and the Speaker of the House. We have got a hearing coming up in Armed Services, the Subcommittee that I Chair, on the 13th of April. If we are going to take action this year on any of these legislative proposals, I think we almost need to have them so that we can consider them at that time.

Do you think that is going to be possible?

Dr. Costello. They are in the General Counsel's office. We will see if we can expedite them in order to have them available to you.[1]

Senator Bingaman. Okay. I think that would be a big help.

I think the Chairman made it fairly clear. My understanding also is the concerns you express in your statement here today have been addressed in the bill that the Chairman is proposing and that Senator Nunn and Senator Levin and myself are cosponsoring. So I do not believe that there is still a problem, and if there is a problem, as Senator Chiles said, if you can advise us as early as possible.

Dr. Costello. If there are substantive issues, we will get back with you as soon as possible.

[The following information was subsequently received:]

The position of the Department of Defense on S. 2215 has been forwarded to the Office of Management and Budget (OMB). OMB will provide the Administration's position on S. 2215.

Senator Bingaman. That is all I have, Mr. Chairman.

Senator Chiles. Senator Levin?

Senator Levin. Well, Mr. Secretary, let me just add my word of welcome and support, both for your Office and for you personally.

---

[1] See p. 203.

You have already got truly a wonderful reputation, well deserved, for bluntness, directness, responsiveness and we are all very appreciative of that.

I only have one question, and that has to do with the history of splitting the authority for cost accounting standards from the accountability for procurements. I believe you have indicated at some point that the splitting of that authority would have a negative impact on DOD's mission.

While I do not happen to agree with that, I am at least willing to take a look at history. What I would like you to do, and I do not know that you could do it here this morning, but perhaps check with some people who have been around a long time and ask those folks who were here in the 1970s if they could go back and reconstruct what difficulties, if any, existed during the 1970s where we in fact had a Cost Accounting Standards Board that was separated from the DOD.

Could you do that?

Dr. COSTELLO. If you would like us to, Senator, we can give you a review with pros and cons, if that would help.

Senator LEVIN. That would be good. I know that you have expressed some concerns about that split. I hope that you will find this bill satisfactory. We think you will and hope you will.

But in any event, if you could just get with some people who were around then and tell us if they had some specific examples from recollections of where there were any problems when there was that split. It might be helpful so we can learn a bit from history, if in fact there were such a thing.

Dr. COSTELLO. We will get back to you. We appreciate the opportunity.

[The following information was subsequently received:]

COST ACCOUNTING STANDARDS BOARD

It is important to know that the prior Cost Accounting Standards Board differed in several respects from the Board that would be established with the Office of Federal Procurement Policy (OFPP) if H.R. 3345, as amended, were to be enacted. Foremost among these concerns is authority for development of regulations governing Cost Principles, a procurement policy matter governing the allowability of costs. H.R. 3345, as amended, would give the Cost Accounting Standards Board exclusive authority to issue these Cost Principles which determine what costs will be paid on defense contracts. The prior Cost Accounting Standards Board did not have authority to establish cost allowabilities. Its authority was limited to allocability of costs, an accounting matter. The reestablishment of a Board with the authorities and responsibilities that H.R. 3345 would provide will diminish the ability of the USD(A) to perform his procurement responsibilities.

Senator LEVIN. Thank you very much.

Senator CHILES. Thank you, Doctor, we appreciate your appearance here today.

Dr. COSTELLO. Thank you.

Senator CHILES. Now we will hear from Robert Bedell, Administrator, Office of Federal Procurement Policy.

We want to welcome you. I think this is your first opportunity to testify before us as the Administrator, even though you have held that office for a good long time with distinction and we are delighted to have you here.

I would ask you to brief your statement for us and we will put it in the record. Our problem is, we are going to have a vote at 11:00 o'clock and that is probably going to terminate our hearing at that time and we have two or three panels coming after you.

TESTIMONY OF ROBERT BEDELL, ADMINISTRATOR, OFFICE OF FEDERAL PROCUREMENT POLICY, ACCOMPANIED BY DR. ALLAN BURMAN, DEPUTY ADMINISTRATOR, AND DAVID BAKER, ASSOCIATE ADMINISTRATOR FOR MANAGEMENT CONTROLS

Mr. BEDELL. Thank you, sir. It will be very brief.

Thank you for the invitation. Let me introduce the 2 gentlemen with me. On my left is Dr. Allan Burman, who is the Deputy Administrator of the Office of Federal Procurement Policy, and Mr. David Baker, who is the Associate Administrator for Management Controls at OFPP on my right.

I would like to introduce my prepared remarks if I may.[1]

Senator CHILES. They will be included in full. It is a very comprehensive and a very good statement. I have looked through it.

Mr. BEDELL. And I am sure you are happy I am not going to read it. [Laughter.]

Let me be as brief as I can possibly be.

The Administration—the President, the Vice President, the Director of OMB—support the reauthorization of the Office of Federal Procurement Policy. They not only support it formally, they support it in day to day activities. And as has already been discussed by previous witnesses, that is critical, in my view, to the success or the failure of OFPP, or any other office in the Executive Office of the President.

Those issues simply have to be brought to those people and have to have their support on a daily basis or they will not work. And the budget process would not work if the President and the Director of OMB did not support it.

I have been fortunate in having that support. Each time I have turned around I have had it and it has been critical. I cannot imagine how I could have carried out any of the functions that we have been exercising, otherwise.

Senator CHILES. I am delighted to hear that and I think that has been evidenced by the work you have been able to do. The bad news is that there was 2 years vacancy before we got you into the office. But I hope that as you leave you will be able to advise a new Director of OMB how critical this is going to be if this office is going to function.

Mr. BEDELL. I shall, and I know I will be joining you in that effort as well.

I might say that when Jim Miller came for his confirmation process, he came back with a much better understanding of the importance of the Office of Federal Procurement Policy and I suspect it had something to do with your conversations with him. As a matter of fact, I know that it did.

---

[1] See p. 55.

I have had that support and it is critical. And it is critical, also, for carrying out what are now very significant Presidential responsibilities. My goal at OFPP, quite simply, is to make procurement reform, procurement regulatory review and procurement legislative matters the fifth of the critical OMB programs carried out on behalf of the President. Along with budget, along with legislative review, along with regulatory review, along with paperwork review, there should be procurement review dealing with regulations, dealing with paperwork, dealing with legislation.

That has been our goal since we got there about 16 months ago, and it has taken all of our efforts and all of our steps to rebuild the office along those lines. What we are doing now, I think is different in terms of emphasis, at least, from past administrations in OFPP. We are reviewing every single procurement regulation that is issued by any Department or Agency. We are reviewing every single piece of paperwork that pertains in any way to the acquisition process.

We have forged the bridge between the Office of Federal Procurement Policy and another one of the offices that you helped create in the Office of Management and Budget, the Office of Information and Regulatory Affairs. I also am a graduate of that program. I am working with my old acquaintances there. We have forged an alliance on paperwork matters to combine the influence of the two offices.

Senator CHILES. Do you think we have the right language in this bill to complete that bridge?

Mr. BEDELL. I have looked at your draft bill. I have not seen the one that has been introduced. But I think the language that I saw will help very much to support that relationship so it will not be as dependent on personalities and relationships between individuals.

I came from OIRA. It was very easy for me to fashion a relationship with my prior office. But I think your bill, the draft that I saw, goes a long way in making that an institutional requirement and I think that is very helpful.

Senator CHILES. If you see anything else we need in that regard, please let us know.

Mr. BEDELL. I shall. The paperwork and regulatory programs I envision are the backbone of OFPP. On a day to day basis that is what OFPP will be doing for as long as I am the administrator and I hope the expectations and the support that others give to the Office will require that of future OFPPs.

The legislative role that we have played and are continuing to play is also critical. The chart that the Comptroller General displayed showing the amount of procurement legislation that is introduced and the amount that is considered in the Executive Branch continues to be of high volume and we spend a good bit of our time looking at that and trying to resolve differences between the agencies on it.

Besides regulatory and paperwork review activities, our continuing involvement with legislative matters will be critical. We have also tried to testify whenever possible before Committees of Congress, and while this is the first time I have been back before the Senate Governmental Affairs Committee, I have had about 9 or 10 different stops on different bills between the time of my confirmation here and today.

So we are trying to be as involved and as constructive as we can, offering our expertise and our insights to the other issues.

Senator **Chiles**. The fact that you have not been back before us sooner is testimony to the job you have been doing.

Mr. **Bedell**. Thank you. But I did miss coming back. And let me at this point join with the others in saying that I have been working with you and Bob Coakley and Mr. Harris for about 15 years now in a variety of different contexts and on all kinds of legislation. You will not hear it often from the Office of Management and Budget, but we can say not only "no", but "thank you" on occasion. And I think this is a good time and you are a good, probably the first, recipient of a "thank you" from us in that regard.

I have gotten my nose in trouble several times. You have bailed me out on several occasions, and so we appreciate it.

Anyway, back to the legislation here. We have drafted some of our own, too. We have some proposed test authority up here and that we think makes some sense. We have a bill on commercial products that is going to be coming out soon as well to carry out some of the purposes of the Packard Commission recommendations. One of the strong findings that they made was that we were buying too much through specialized regulations and specialized specifications and not enough from the private sector. We were not getting all the benefits of the commercial marketplace on the goods and services that DOD buys, and the other agencies buy, as well.

We have drafted a unified statute. The Commission on Government Procurement, as you well know, recommended not only that we have a unified regulatory process, but that we have a single statute that governs all procurement activities, and combines all 4,000 provisions of law that pertain to the acquisition process.

Now, we have drafted that. Needless to say, there are a lot of agencies and officials who have views and some comments on it, and it has taken a lot longer in that regard than we had hoped. But that will be coming up shortly.

We have also enjoyed working with your staff and the staffs of the other members on OFPP's reauthorization, including reviewing the drafts that we have commented on already.

Running through a list other things—besides the bread and butter activities of regs, paperwork review and legislative review—we have been involved with some other matters as well, not all of them popular. One is the contracting-out program that the President has recently issued an Executive Order on. It is one that has occupied a good bit of our time.

We have been involved in some trade issues, some "Buy American" activities, issuing guidance on the Brooks-Murkowski Japanese construction ban. As the Comptroller General noted, we are trying to come up with a methodology to deal with profits of defense contractors so that we can better understand them without burying all of us in paperwork, in paperwork that is very sensitive to industry, sometimes the most sensitive data that they had. We are trying to fashion at least a methodology by which that information can be collected, analyzed and understood.

And we have had very good cooperation from Dr. Costello and his office and, in particular from Milton Socolar from the GAO and we hope to be coming out with a report on that, which will be our conclusions, in the next couple of months.

The Florida demonstration project, with which I know you have had an awful lot to do in the past years, currently is a matter that we have taken a shine to, too, not just simply on our own but because we knew of your long interest in the matter. And so has the Vice President. One of the things we have done is utilize the Vice President's Task Force on Regulatory Relief.

As you know, when the President reconstituted it this last year, he put procurement reform right into the charter of that task group and we have used that to a good advantage, I think. Dr. Costello has appeared there with us about 3 times now, presenting the different initiatives we have, making sure that the West Wing in the White House was on board with some of the initiatives we are pursuing. And the Florida demonstration program has been one of them.

As you know, they are about to announce an expansion of that program. It has been so successful that we are going to expand it into other areas outside of the State of Florida to spread some of those good ideas around, and to start covering research contracts as well as the grant programs.

The purpose there, as you well know, is to try to get paperwork out of the in-boxes of researchers so they can do more, they can have more time to spend actually doing research than filling out Government forms. What we want to do in this next phase is get the paperwork requirements that come from the university system and from the states out of there too.

We have several other items that we have been working on here that I listed on my scratch pad, but I will refrain and see if there are any questions that I can try to answer.

Senator **Chiles**. I am delighted to get your statement and look at all the areas in which you are working and I think a number of them are tremendously important. The Florida demonstration project, of course, for those in the audience, is not to be just a Florida thing. It is to try to allow in all of this research and grants that we get the money where it is supposed to go. At the same time we have accountability, but we do not have everything being spent in paperwork, and that is where we found ourselves before.

Last August I held hearings in Tampa where we heard horror stories from the subcontractor community regarding their lack of protection under the Personnel Sureties Program. We talked about how to change current regulations and make sure that somehow these subcontractors get protected. I do not favor eliminating the Personnel Sureties Program unless subcontractors are protected.

Can you tell us where we are on that issue and do you have the authority to get that job done? And will we get it done before I have to leave office? And you have to leave office?

Mr. **Bedell**. Let me answer the last question first. Yes, we will.

After the hearing in Tampa in August, I returned and, wrote a letter to the two councils that are processing these regulatory changes. You may recall that one of the problems was that the people who had complained about personnel sureties had simply been told that their case did not warrant further consideration.

I wrote them a letter saying that we thought that it did, especially as a result of the hearings held in Tampa, and suggested that the councils re-open it and that they consider several of the issues that were raised there. We gave them a copy of the transcript and other things for their assistance.

We checked back with them recently to see how they were coming on it and they are proceeding. They have indeed decided to open a case. They have consolidated a couple of the smaller cases that they had. They expect that they will complete their action in June of this year.

When I saw that I thought maybe we could improve upon it. We will see if we cannot get that going a bit. We will take a look under our current authority at what they propose in the way of a solution. If it is not good enough, that is one of those circumstances that we can then step in and use the regulatory authority which you described earlier to fashion a result.

One thing I can tell you is that sooner than my leaving or your leaving we will have a solution to that problem.

Senator CHILES. Good. Well, I have some other questions, but if I could, I will ask you some for the record because we do want to try to get to our other panels.

But thank you very much for your appearance today.

Mr. BEDELL. Thank you, sir.

Senator CHILES. As you are studying the legislation, if you come up with any helpful suggestions, we will be glad to have them.

Mr. BEDELL. Good. Thank you, again.

Senator CHILES. Now we are going to have a panel of former administrators of the Office of Federal Procurement Policy; Hugh Witt, who is now with United Technologies, was the first administrator; Lester Fettig, President of Fettig, Inc., was the second; Karen Williams, who is now practicing with Crowell and Moring; and Don Sowle, who is now a consultant, served as administrator for probably the longest period of time.

We are delighted to have you all with us. I think you heard me say we are on a short time fuse because we are going to leave for a vote at 11. But I would like to know what you can tell me that I need to know about the amendment, the new changes we are making.

Hugh, we will let you take the first swing at that.

TESTIMONY OF HUGH WITT, CONSULTANT, UNITED TECHNOLOGIES, OFPP ADMINISTRATOR, 1974–77 [1]

Mr. WITT. It is a pleasure to be here. I have sat before you a number of times over the years and I cannot say it has always been a complete pleasure but it has always been interesting, and I think maybe we have both learned over the years.

But it is interesting to hear these discussions of procurement.

---

[1] See p. 133 for Mr. Witt's prepared statement.

Senator CHILES. Let me just say as I leave, that I hope that I have the same kind of success that former administrators of OFPP have had when they get on the outside. [Laughter.]

You all look like you are wearing awfully good clothes and jewelry and watches and I am delighted to see that.

Mr. WITT. We had no way to go but up, sir. [Laughter.]

We used to have a saying in the Pentagon that some people say there "ain't" no hell, but they are not in procurement, so how can they tell?

I am speaking for myself only this morning, and I will not go over this statement in detail.

I agree basically with the thrust of what I have heard here today. It think the administrator should be active in participating in the FAR Council, which has been somewhat controversial. I do think, also, that concerning the scope of authority vested in the administrator, I am convinced that the law should make clear that the administrator does have regulatory authority, after watching this 13 or 14 years.

Somebody said that you can get more done with a smile and a gun than you can just with a smile and I think the gun would be helpful, sir.

Also, I am not alarmed that someone holding that post would issue regulations which would endanger the defense of the Nation. I feel sure that the agencies and departments are quite capable of taking care of themselves. I found that out. They have strong friends in the Congress and there is not any chance for the administrator to run rampant and ruin any of the agencies of the Government. We have got too many checks and balances for that to happen, in my opinion.

Assessment of the effectiveness, you asked about. I think it should be reauthorized. It should be given permanent authorization, in my opinion. That would assist the administrator in getting hold of good staff and keeping them after you get hold of them. This constant threat of will this job be here another 3 years from now is a deterrent to getting good people and hanging on to them.

So I would favor at this point permanent authorization. Effectiveness in the immediate past, I would say the present administrator has shown a credible amount of constructive activity. At the same time, he has approached the use of his authority with a certain amount of reason, it seems to me.

It is obvious that he understands the political nuances of the game, as far as I am concerned.

Senator CHILES. I am going to re-examine at that permanent authority, now. I mean, now that we have had a little testing. You know, for a while we had to just check it out. Maybe we can look at it.

Mr. WITT. Understood.

Senator CHILES. Now that Fettig has moved on, maybe we could look at the permanent reauthorization.

Mr. WITT. I was not going to mention any names, sir. [Laughter.]

I agree that the CAS Board should be established. I am convinced that the OFPP is the only logical location for it. I strongly urge that cost/benefit analysis be made before any of those standards are issued in final form.

I congratulated the administrator of OFPP last June for taking the lead in working on the methodology problem on profit studies. I think that is a good approach. I do feel that profit policy itself must remain with each Government agency. The individual agencies have their own assigned missions and I think they should have the freedom to fashion their own profit policies.

Just to finish up on this profit discussion sir, I would say that the entire business of the profit methodology reporting and analysis is extremely sensitive and should be approach very carefully. There is a recent study—I do not know whether you have seen it yet—by the MAC group of Harvard University that shows in a very stark fashion the impact that a number of Government laws and regulations will have on defense contractor profits unless corrective action is taken.

We may well be discussing a few profit policy trees while the forest is in danger of burning down. I hope that the Congress will look very carefully at that study and accept it as a good valid study of the impact that all the regulations and laws that have been passed, particularly over the last 5 or 6 years, will have on the profitability of the American defense contracting community. We are talking about the defense base and industrial preparedness. I am afraid there will not be any industrial base 5 years from now, very frankly.

Thank you, sir.

Senator CHILES. Thank you.

Mr. Fettig, you have had two kinds of hell, I guess, having worked for me and the Director.

TESTIMONY OF LESTER FETTIG, PRESIDENT, FETTIG, INC., FORMER OFPP ADMINISTRATOR, 1977-79[1]

Mr. FETTIG. I think, Mr Chairman. All that means is I know I have been in a position with you with the finger on the trigger and also looking down the barrel on the other end. So I know the sensations from both ends, sir.

I will try to make my remarks brief, and devote most of them to thanking you for what you have done for all of us. Sixteen years ago, I think, at the first hearing of the ad hoc Subcommittee I was going over to National Airport to try to find you. In the meantime, you were walking in the door. We were running late and I want to compliment the staff we have left behind for running things better.

The other "chairmanship" I regret to see you leave is that of the "Society of Honorary SYSIPHI" who have kept rolling the stones up the hill. The membership has been a glorious one over the years under your leadership. I am glad to see, and I am sure with some relief on your part, to see people like Senator Bingaman and Senator Levin who have to keep rolling that stone now.

But over the years I have had a great appreciation and admiration for everything you have done. I hope it is perceived in a context. I know Jack Pridgen and Dennis Beal are responsible for portraying it, but from a citizen's standpoint you hear so much political dialogue about the gross inputs and outputs and as the Chairman of Budget, you know we debate how much taxes, how much revenues and how much spending.

---

[1] See p. 137 for Mr. Fettig's prepared statement.

You have been for 20 years Mr. Goodwrench in the middle, trying to see that we get more miles per gallon out of the process. If there is gain to be made and credit to be had, I know I wish we had gotten you more press in Florida for the efforts, but this is an occasion when—maybe this Washington community even appreciates it better than the folks back home—a big thank you to you.

Thank you.

On the bill itself, I think I am proof that any Administrator, even with full directive authority, cannot run rampant, even when he tries. [Laughter.]

The initiatives we took during my tenure, both Hugh Witt and I enjoyed full directive authority and we experimented quite a bit ourselves in a variety of arenas, including contracting out, mission area budgeting and A109 and so forth.

The checks and balances are real. They are very severe, as Secretary Marshall let me know on one occasion, as Griffin Bell let me know on another, as you yourself let me know on several.

I see no problem with directive authority but the whole issue really pales against the very statesmanlike job you have already done with the other key institutions who are affected. If you have a satisfactory working arrangement with the Defense Committees, I think that has to be uppermost in mind before a bill goes on the House Floor.

The FAR Council, as I envisioned it when we started the project, did not need to be codified. I strongly endorse codification now, particularly in light of a debate over whether full authority will be restored. I fully feel that we could not have started the FAR project at all if I had not had the directive authority, and then the very, very good cooperation of the Pentagon and the other agencies.

On the CAS Board, I will certainly defer to Mr. Bowsher. It just strikes me that since we are carrying allowability in Part 15 of the FAR there ought to be an obvious consistency to maintain OFPP as the logical place for CAS.

Mr. Chairman, I will not take up any more of the Committee's time. I know you have a Panama vote coming up.

Thank you.

Senator CHILES. Thank you.

Karen, we are delighted to have you here this morning.

TESTIMONY OF KAREN HASTIE WILLIAMS, ATTORNEY AT LAW, CROWELL AND MORING, FORMER OFPP ADMINISTRATOR, 1979-81

Ms. WILLIAMS. Thank you very much, Mr. Chairman. I will try to confine my remarks to the proposal, but I would be remiss if I did not add my appreciation for your work both here in this Committee and working with you in the Budget Committee.

You are the kind of public servant that hopefully gives young people hope for the future. Paul Volcker whose commission is looking at ways to bring young people into Government service should look to you as an example of a public champion who can improve the governing process and at the same time be very effective in support of his constituents in the Congress.

Let me say with respect to the Senate proposal that I strongly endorse the reauthorization of OFPP. Now more than ever with the complexity of the procurement process there has to be a centralized organization to monitor Federal procurement policies, procedures, regulations and forms.

I think that the Senate bill, which calls for the OFPP Administrator to have initiation responsibility, is an important first step. I would ask the Committee to look again at the proposal coming from the House with respect to restoring full regulatory authority to OFPP. As Les mentioned, there are numerous checks and balances within the system that will put controls on the Administrator. But, there is the need for the iron hand in the velvet glove to influence the interrelationship among the agencies and the role of OFPP.

With respect to the FAR Council, I think that the Council is critical. The proliferation of sub-tier regulations throughout the departments is an abomination. I have given a couple of examples in my written testimony for the record of the kinds of duplicative effort that the FAR was intended to eliminate. But unfortunately, this problem has not been seriously addressed in the agencies.

Bob Bedell, the current administrator, has made a yeoman's effort in trying to put controls on the proliferation of the sub-tier regulations, but yet they still come out. I think that the FAR Council will be very effective if the agencies become serious about working with the Administrator of OFPP to establish consistent, nonduplicative regulations.

On another item I support fully the CAS Board being placed in OFPP. I think that is the logical place for it to be. I would hope, though, that allowability as well as allocability could be included in the CAS Board jurisdiction with the recognition that the allowability issues are policy issues and that the agencies do have to play a role with respect to what cost principles go forward. But I think the both objectives can be met. I hope that the Committee can work with GAO and work with the agencies to fashion language that allows that policy role to be maintained.

I think Dr. Costello approached it very effectively in his testimony. I would just add, Mr. Chairman, that the Committee may want to look at ways that OFPP can use its special test authority in areas such as enhanced competition among small business. There is a pilot program that I have discussed before the Small Business Committee to which I have referred to in my written testimony. I would be happy to work with you and the staff on the pilot and other aspects of the OFPP reauthorization.

Senator Chiles. Fine. Thank you.

Don, you go back to the earliest days. Before I ever got around to procurement matters you were working with the old Commission and then you served ably as the administrator.

We are delighted to have you here.

TESTIMONY OF DON SOWLE, CONSULTANT, FORMER OFPP ADMINISTRATOR, 1981-85

Mr. Sowle. Thank you, sir. I am really honored to be here in my rented suit today. [Laughter.] Especially because I do not have any influence anywhere any more. And as a result of that I think I can say what is really on my mind and I would like to do that.

Senator CHILES. Well, I notice that we list you as a consultant. That might be my title when I leave here.

Mr. SOWLE. Let's join up.

I have basically three things I would like to cover, and perhaps the most important is an anecdote I would like to give just prior to your leaving office. Very few people know about this other than you and me, and perhaps you have forgotten about it in all your busy activity up here.

But when you replaced Senator Jackson, Mr. Holifield went over and talked to the leadership of the Senate at that time and asked them who would be the best candidate for replacement of Senator Jackson and, of course, your name was the one that they recommended. They set up a meeting for Mr. Maguire to come up to the Hill for a meeting in your Capitol Hill office.

I think there were just the three of us there, and you listened to his story about how important this was. And when he finished all of this, you said, well, I agree, procurement is very important, but I also have a responsibility to my constituents down in Florida. I came up here to do a specific job for them and I will join up on one condition only and that is, instead of having your meetings out at Linden Hill and over on the Eastern Shore, you hold them up here so that I can go and vote when I have to. And that is when we changed and held our meetings in the Joint Atomic Energy Committee room, as you know.

I have three papers I would like to submit——

Senator CHILES. The reason they all agreed from the Senate to put me on that Commission, I was making bombs down in the basement at that time and chiding about the seniority system and other things and they were going to bury me in this Commission.

Mr. SOWLE. I have three papers I would like to submit for the record signed off by Elmer Staats. They are PRT views related to the three major portions of your bill.

Senator CHILES. They will be part of the record.[1]

Mr. SOWLE. All right, sir.

I would like to speak very directly and very briefly, but I think a little out of line with a lot of other people, on the regulatory authority of OFPP. You know, we have been dancing around this thing now for 15 to 20 years on who is going to have regulatory authority, and all the organizations that must come together to try to make this work. In fact, I testified on this some 4 years ago that OFPP had enough authority to go through the back door and this was going to be effective and adequate.

It turns out it is not really very workable because it is too cumbersome, time consuming. And with three councils, with three activities involved—the Civilian Agency Council, the DAR Council, and then the FAR Secretariat.

All of these get in the act and they are passing papers back and forth and I think it is time that OFPP have ultimate, final authority on regulations. But in the interest of DOD, who has 80 or 85 percent of the procurement responsibility, any way you want to hack it, every year, they should have complete operational day to day responsibility for seeing that the regulations get out with proper participation from the other agencies and, of course, down through the Subcommittee structure.

---

[1] See p. 215.

As you know, the Subcommittees do most of the work, anyway. And where there is a particular regulation that is going to affect one of the departments—DOD or DOI or whoever, then they should be invited and expected to participate in the development of those regulations.

I think this has a lot of advantages, which I will not go into in detail because I know you are short on time. But basically, this would speed up the process, which is really critical today, up to 1 or 2 years to get a regulation out, reduce the number of regulations, easier and less costly for industry to participate and respond to the regulatory developments, a single point of contact for the Congress, and probably minimizes the need for more legislation, and particularly detailed legislation. It would provide reasonable checks and balances and Congress could be kept informed by an annual report as to what is going on.

I would like to see someone specifically in charge of procurement regulations, no ifs, ands and buts. I like what you have done so far in your bill but I would think that we at this time ought to consider going a little further with it.

The disadvantages, obviously, are the emotions that will initially soar all over the place and all the "chicken littles" who will come out of the woodwork and say, look, it is going to kill us, we are not going to be able to carry out our missions, and so forth. That is a bunch of hogwash.

You know, the OFPP has a boss, OMB, and the President, I think, should have the authority over regulatory process within the Executive Branch, wherever he puts that. And of course today it would be in OFPP, but all kinds of checks and balances exist throughout the system.

I would really like to see this done. I am not so naive as to think that everybody is going to embrace this, but if we could pull something like this off, I think it would work a lot better than it is working today and we would really have some control over the regulatory process.

If the staff would like to talk more about this, I would be glad to work with them. I would also like to say that I support the reauthorization of OFPP on a permanent basis and that the grade level should be raised to a level III, not only for the interface within OMB but with all the other agencies that they have to work with.

I will be glad to answer any questions.

Senator CHILES. Well, we thank you all and I may have some questions that I will submit in writing. We do look forward to hearing more from you in regard to our legislation.

We thank you all for your kind remarks.

Now, we are going to put our next two panels on at the same time in the interest of time.

We have next Mr. Jean A. Caffiaux, Senior Vice President, Government Division, Electronic Industries Association, Washington, D.C., Mr. Clarence Kipps, partner, Miller and Chevalier, U.S.

Chamber of Commerce, Washington, D.C., and Mr. Robert Trimble, Vice President for Contracts with Martin Marietta, and then Ms. Nelson, the Director of Government Relations of the American Subcontractor Association, and Mr. Stanley C. Dees, Chairman of the Section of Public Contract Law of the American Bar Association.

All of your statements in full will be placed in the record, and we will start with Mr. Caffiaux.

TESTIMONY OF JEAN A. CAFFIAUX, SENIOR VICE PRESIDENT, GOVERNMENT DIVISION, ELECTRONIC INDUSTRIES ASSOCIATION, WASHINGTON, DC [1]

Mr. CAFFIAUX. Thank you, Mr. Chairman.

In order to provide time for my colleagues to make their statements I will keep my comments very short. I have abbreviated comments. I will abbreviate those.

I would like to say that on behalf of our association, we believe that OFPP performs a very unique task. We believe they should be authorized permanently in order to insure consistency in procurement policy.

I am glad to hear that you are giving consideration to a permanent reauthorization, and, sir, we would support that very much.

We believe that the present charter of OFPP is very adequate, we believe it is broadly scoped, and we believe that that charter should be continued.

We believe that the effectiveness of OFPP, like so many regulatory agencies, is rather dependent upon the Government environment in which it operates.

We believe that environment, right now, is probably as good as it ever has been in many years. We think the Packard Commission impact, which Congress has received rather well, and DOD establishment of the Under Secretary of Defense for Acquisition, we think those things have helped this environment. So we think OFPP is in the right place, at the right time, to do some good things, and Mr. Bedell I think has proven that.

We are aware that there are some other issues that are being considered by this Committee in connection with this legislation, and, very briefly, would like to comment on those.

Regarding the Cost Accounting Standards Board, we support the establishment of the functions of the Cost Accounting Standards Board in OFPP.

We have a few points we would like to work into that. One, we do believe that the function should have the exclusive responsibility on authority, for allowability, as well as for allocability of cost of defense contracts.

We believe the board structure should be that corresponding to one in H.R. 3345, the House bill, and we believe another point that is in the House bill that we would suggest you consider in your bill, sir, is that the protections for properly negotiated fixed-price contracts should be added to your bill.

---

[1] See p. 164 for Mr. Caffiaux's prepared statement.

That involves the retroactivity of changes in cost-accounting standards which we think would be inappropriate to apply retroactively to fixed-price contracts.

We are very strongly opposed to any system of mandatory profit reporting. We have testified on that before Mr. Brooks earlier, last year, and our testimony on that is part of the record.

We do believe, and support the fact that there should be a central procurement policymaking responsibility in all Government agencies, and we think that would be of great assistance to the Administrator of OFPP.

So, in conclusion, we do support the reauthorization of OFPP, we think that should be permanent, we think its charter is good, we agree with the cost accounting standards function, we oppose the profit reporting function, and we encourage the establishment of a single central authority for procurement policymaking in each agency.

And we will be glad to answer any questions if there is time, sir, but that is the bulk of our position.

Senator CHILES. Thank you, sir.

Mr. Kipps?

TESTIMONY OF CLARENCE T. KIPPS, JR., PARTNER, MILLER & CHEVALIER, U.S. CHAMBER OF COMMERCE, WASHINGTON, DC[1]

Mr. KIPPS. Thank you, Mr. Chairman.

I am pleased to testify today as a representative of the U.S. Chamber of Commerce. The Chamber strongly supports reauthorization of the Office of Federal Procurement Policy.

OFPP should continue to provide the leadership in developing appropriate and uniform procurement policy. The Chamber believes that with proper authority and staffing, and the support of the Administration and the Congress, OFPP can fulfill its important mission.

The Chamber supports the Administration's position that current OFPP authority is sufficient. The Chamber believes that OFPP does now have and should have the regulatory authority necessary, first, to develop and impose Executive Branch policy, and, second, to implement Congressional directives in the event that the buying agencies fail to follow policy guidance, or to act in a timely manner.

The Cost Accounting Standards Board that would be established under Section 5 of the House bill closely reflects the industry consensus developed over many years, and the Chamber supports that formulation.

We understand, and are concerned that the draft Senate bill takes a different approach. The Chamber believes that the CAS Board should have final regulatory authority on its decisions, and that the industry and Government should have equal representation on the board.

Also, the language crafted for a required change in accounting practice should recognize that the adjustment could be upward or downward, depending on what is fair to both parties under the circumstances.

---

[1] See p. 175 for Mr. Kipps' prepared statement.

The Chamber supports the requirement that OFPP review and determine an appropriate methodology to be used by the buying agencies whenever they conduct future studies of contractor profits.

We remain adamantly opposed to any proposal for mandatory reporting of contractor profits. We believe the so-called procurement integrity section in the House bill is unnecessary and counterproductive. There is already more than enough legislation in that area on the books.

We would be pleased to work with the Committee in working out any language, and answer any questions that it has.

Senator CHILES. Thank you.

Mr. Trimble?

TESTIMONY OF ROBERT TRIMBLE, VICE PRESIDENT FOR CONTRACTS, MARTIN MARIETTA, INC., AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC., WASHINGTON, DC

Mr. TRIMBLE. Mr. Chairman, I represent the Aerospace Industries Association. It is my understanding that our testimony will be entered into the record? [1]

Senator CHILES. Yes.

Mr. TRIMBLE. I have four principal points to make, which I will make very quickly in the interest of time.

We in Aerospace Industries Association strongly endorse the reauthorization of the Office of Procurement Policy. We do also believe that it requires the support of the President, the Congress, and the Director of the Office of Management and Budget.

Second, we do recommend that the Cost Accounting Standards Board be established under OFPP and have responsibility for both allocability and allowability.

Three, we favor the profit methodology section of your bill but we very strongly oppose mandatory profit reporting.

And four, we are against this bill being used for ancillary types of matters to be considered as a part of permanent legislation.

Thank you, sir.

Senator CHILES. Thank you, sir.

Ms. Nelson?

TESTIMONY OF COLETTE NELSON, DIRECTOR OF GOVERNMENT RELATIONS, AMERICAN SUBCONTRACTOR ASSOCIATION, ALEXANDRIA, VA[2]

Ms. NELSON. Mr. Chairman, the advantage of being on at this time in the hearing is that I basically can say "me, too." "Me, too," in commending you for the work that you have done with the Subcommittee. And "me, too," that ASA is a very strong supporter of the reauthorization of OFPP.

We believe that OFPP needs to be given the tools to do its job. We believe that your bill does that. We believe that OFPP needs the leadership to use those tools and we believe that Mr. Bedell is providing that leadership.

---

[1] See p. 182.

[2] See p. 187 for Ms. Nelson's prepared statement.

Our written statement goes into much greater detail with some of our concerns, and I am sure that you will have an opportunity to review those.

Thank you, Mr. Chairman.

Senator CHILES. Thank you very much.

Mr. Dees?

TESTIMONY OF C. STANLEY DEES, CHAIRMAN, SECTION OF PUBLIC CONTRACT LAW, AMERICAN BAR ASSOCIATION, WASHINGTON, DC

Mr. DEES. Senator, I am Stanley Dees, Chairman of the Public Contract Law Section this year, of the American Bar Association. I am speaking on behalf of the section and am not speaking on behalf of the entire bar association.

We have a statement which we have submitted,[1] and a letter to you dated February 12,[2] addressing the earlier version of the bill from the House, and we would ask that those two documents be included in the record.

Senator CHILES. They will be.

Mr. DEES. Briefly, let me summarize that the Public Contract Law Section of the ABA today, and has always, supported a strong OFPP.

The need for a strong OFPP to provide policy and regulatory leadership is clear. We ask the Committee to make it strong, and give it at least a 4 year additional lease on life.

Second, we believe that the OFPP should have the authority to be the ultimate regulatory authority, and we urge the Committee to give thought to strengthening this.

We know that there are considerations here from other interests in the Executive Department, and the Senate, but it should not be necessary for the OFPP Administrator to determine whether the agencies have refused to act or failed to act before providing that leadership.

We think it should have ultimate authority. It should not be daily regulatory authority, but there should be no hampering of the ability to exercise that authority.

We also urge, in that same regard, that they have the authority to deny or rescind, that you modify 405(f) to give that authority to the OFPP Administrator rather than the OMB Director.

With respect to the single regulatory council, the provision in the Senate bill is an improvement over the language in H.R. 3345, but we believe the bill needs, and are willing to work with your staff to accomplish, greater clarification of what is the role of that council. We think that can be spelled out more clearly, and should be.

With respect to the Cost Accounting Standards Board there is a need for such a board. We support the placement of that board in OFPP. We have three problem areas which we have raised in our statement and we will work with the staff on them.

---

[1] See p. 196.

[2] See p. 237.

We believe you should give some role to that board in allowability. Even if ultimate policy on allowable cost stays with the agency, the accounting or the methods for determining allowability should be with the CAS board.

We believe that the CAS board provisions should have the exceptions for certain categories of contracts, advertised or sealed bid contracts, and contracts where there are other exceptions to the requirements of cost or pricing data. We think the legislation should include those exceptions and we think that consideration should be given to enough notice and comment, and other administrative due process requirements governing the conduct of the CAS board.

I know that your time is short and I will conclude my testimony with appreciation for the opportunity to testify, and, if you will permit me, one personal note on behalf of myself and the section. I have been practicing in this area for about 25 years, and the section of public contract law is nearly that old, and for more than half of that time, you, Senator Chiles, have been a leader in the area of procurement law reform, and we are sorry that this will be the last year that we will be testifying before you and the Committee which you have chaired, which has done important things for the area of procurement law.

Senator CHILES. Well, we thank you very much, and I thank each of you for your statements. I am sorry our time is short and that I cannot draw you out a little more in questions.

We may take the opportunity to ask some written questions. I am delighted to see the support that we continue to receive from the lawyers in public contracts law as well as the accountants. I see Mr. Sparks. He stands out in the audience. He was the general counsel of the Commission and I know he has continued to work in that area throughout all the time. We are delighted to see him backing you up.

We will recess our hearings now. We will keep the record open for a number of days for questions and statements.

We thank you very much for your testimony.

[Whereupon, at 11:15 a.m., the Subcommittee was adjourned, subject to the call of the Chair.]

APPENDIX

100TH CONGRESS
2D SESSION

S. 2215

To amend the Office of Federal Procurement Policy Act to authorize appropriations for an additional four years, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 24 (legislative day, MARCH 21), 1988

Mr. CHILES (for himself, Mr. NUNN, Mr. LEVIN, and Mr. BINGAMAN) introduced the following bill; which was read twice and referred to the Committee on Governmental Affairs

---

A BILL

To amend the Office of Federal Procurement Policy Act to authorize appropriations for an additional four years, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Reauthorization of the Office of Federal Procurement Policy Act of 1988".

REAUTHORIZATION OF THE OFFICE OF FEDERAL PROCUREMENT POLICY

SEC. 2. Section 11 of the Office of Federal Procurement Policy Act (41 U.S.C. 410) is amended by striking out "1984" and inserting in lieu thereof "1989".

GOVERNMENT-WIDE PROCUREMENT REGULATIONS

SEC. 3. Section 6(b) of the Office of Federal Procurement Policy Act (41 U.S.C. 405(b)) is amended by inserting after "timely manner," the following: "including any such regulations, procedures, and forms as are necessary to implement prescribed policy initiated by the Administrator under subsection (a),".

FEDERAL ACQUISITION REGULATORY COUNCIL

SEC. 4. The Office of Federal Procurement Policy Act (41 U.S.C. 401 et seq.) is amended by adding at the end thereof the following new sections:

"FEDERAL ACQUISITION REGULATORY COUNCIL

"SEC. 25. (a) There is established a Federal Acquisition Regulatory Council (hereinafter in this section referred to as the 'Council') to assist in the direction and coordination of procurement regulatory activities in the Federal Government.

"(b) The members of the Council shall be the Administrator and the official assigned by statute with the responsibility for acquisition policy in each of the General Services Administration, the Department of Defense, and the National Aeronautics and Space Administration. If no official in any of such agencies is assigned by statute with the responsibility for acquisition policy for such agency, the head of such agency or any official designated by the head of such agency shall represent the agency on the Council.

"(c) Subject to the provisions of section 6 of this Act, the General Services Administration, the Department of Defense, and the National Aeronautics and Space Administration, pursuant to the respective authority of each such agency under title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 251 et seq.), chapters 4 and 137 of title 10, United States Code, and the National Aeronautics and Space Act of 1958 (42 U.S.C. 2451 et seq.), shall jointly issue and maintain a single Government-wide procurement regulation, to be known as the 'Federal Acquisition Regulation'. An executive agency may promulgate a procurement regulation only to the extent that such regulation is appropriate to a 'single system of Government-wide regulations' as such term is defined under section 4(4) of this Act. The Administrator, in consultation with the Council, shall ensure that procurement regulations promulgated by executive agencies are consistent with the Federal Acquisition Regulation.

"(d) Subject to the authority, direction, and control of the head of the agency concerned, each official described or appointed under subsection (b) shall—

"(1) approve or disapprove all proposed and all final regulations of the department or agency of such official relating to procurement;

"(2) carry out the responsibilities of the department or agency set forth in chapter 35 of title 44, United States Code, for each information collection request (as defined in section 3502(11) of title 44, United States Code) that relates to procurement rules or regulations; and

"(3) eliminate or reduce the redundant or unnecessary levels of regulatory review in the procurement system of the department or agency of such official.

"(e) All actions of the Council and of members of the Council shall be in accordance with and in furtherance of the policies of sections 2 and 6(a) of this Act.

"(f) Subject to the provisions of section 6(b), the Council shall—

"(1) manage, direct, coordinate and monitor the maintenance and issuance of modifications of the Federal Acquisition Regulation;

"(2) publish a report 6 months after the date of enactment of this section and every 6 months thereafter relating to the development of procurement regulations to be issued jointly by members of the Council and to the extent appropriate, by each of the General Services Administration, the Department of Defense, and the National Aeronautics and Space Administration;

"(3) include in each report published under paragraph (2)—

"(A) the status of each such regulation;

"(B) a description of the regulations which are required by statute;

"(C) whether public comment in accordance with section 22 of this Act, and to the extent appropriate, sections 3504(h) and 350[illegible] of title 44, United States Code, was sought with regard to each proposed regulation;

"(D) regulatory activities completed and initiated since the most recently published report;

"(E) regulations, policies, procedures, practices, and forms under consideration or review by the Office of Federal Procurement Policy;

"(F) whether the regulations have paperwork requirements;

"(G) the progress made in promulgating and implementing the Federal Acquisition Regulation; and

"(H) such other matters as the Administrator determines useful; and

"(3) within 180 days after the date of the enactment of this section, submit a report to the Congress, after consultation with the Administrator of the Office of Information and Regulatory Affairs, regarding—

"(A) the extent of the paperwork burden created by the Federal procurement process; and

"(B) the extent to which the Federal procurement system can be streamlined to reduce unnecessary paperwork while maintaining recordkeeping and reporting requirements necessary to ensure the integrity of the system.

"COST-ACCOUNTING STANDARDS BOARD

"SEC. 26. (a)(1) There is established within the Office of Federal Procurement Policy the 'Cost-Accounting Standards Board' (hereinafter referred to as the 'Board'), which shall consist of 5 members, including the Administrator, who shall serve as Chairman, and 4 other members, all of whom shall have experience in Government contract cost accounting and who shall be appointed as follows:

"(A) two shall be appointed who are officers or employees of the Federal Government—

"(i) one of whom shall be an officer or an employee of the Department of Defense and shall be appointed by the Secretary of Defense; and

"(ii) one of whom shall be an officer or an employee of the General Services Administration appointed by the Administrator of General Services.

"(B) one shall be appointed by the Administrator from private industry; and

"(C) one shall be appointed by the Administrator from the accounting profession.

"(2)(A) The term of office of each of the members of the Board, other than the Administrator, shall be 4 years, except that—

"(i) any member appointed to fill a vacancy on the Board shall serve for the remainder of the term for which his predecessor was appointed; and

"(ii) no individual who is appointed under paragraph (1)(A) of this section shall continue to serve on the Board after ceasing to be an officer or employee of the agency from which appointed.

"(B) A vacancy on the Board shall be filled in the same manner in which the original appointment was made.

"(C) The initial members of the Board shall be appointed no later than 90 days after funds are appropriated under subsection (l)(1) of this section.

"(3) Each member of the Board who is not an officer or employee of the Federal Government shall receive compensation at a rate not to exceed the daily equivalent of the rate prescribed for level V of the Executive Schedule for each day (including traveltime) in which the member is properly engaged in the actual performance of duties vested by law in the Board.

"(b) The Administrator, after consultation with the Board, may appoint an executive secretary and two additional staff members without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and may pay such employees without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, except that no individual so appointed may receive pay in excess of the annual rate of basic pay payable for GS–18 of the General Schedule.

"(c) The Administrator may appoint, fix the compensation, and remove additional employees of the Board under the applicable provisions of title 5, United States Code.

"(d)(1) The Board may use, without reimbursement, any personnel of a Federal agency (with the consent of the head of the agency concerned) to serve on advisory committees and task forces to assist the Board in carrying out the functions and responsibilities of the Board under this section.

"(2) The Administrator, after consultation with the Board, may procure temporary and intermittent services under section 3109(b) of title 5, United States Code, of personnel for the purpose of serving on advisory committees and task forces to assist the Board in carrying out the functions and responsibilities of the Board under this section. Any individual so hired may be paid at rates for individuals not to exceed the daily equivalent of the rate of pay payable for level V of the Executive Schedule for each day (including travel time) in which such an individual is properly engaged in the actual performance of duties under this section.

"(e) Except as otherwise provided in subsection (a), the members of the Board who are officers or employees of the Federal Government, and officers and employees of other agencies of the Federal Government who are utilized under subsection (d) shall receive no additional compensation for services, but shall continue to be compensated by the employing Department or agency of such officer or an employee. Appointees under subsection (d) from private life may receive compensation at rates fixed by the Administrator, but not to exceed the daily equivalent of the rate prescribed for level V of the Federal Executive Salary Schedule under section 5316 of title 5, United States Code, for each day (including travel-time) in which such appointees are properly engaged in the actual performance of duties under this section. While serving away from homes or the regular place of business, Board members and other appointees serving on an intermittent basis under this section shall be allowed travel expenses in accordance with section 5703 of title 5, United States Code.

"(f)(1) The Administrator, after consultation with the Board, shall have the exclusive authority to make, promulgate, amend, and rescind cost-accounting standards and interpretations designed to achieve uniformity and consistency in the measurement, assignment, and allocation of costs to contracts with the United States.

"(2) The cost-accounting standards, promulgated by the Administrator after consultation with the Board, shall be used by all executive agencies and by contractors and subcontractors in estimating, accumulating, and reporting costs in connection with pricing, administration, and settlement of all negotiated prime contracts with the United States in excess of $100,000 and negotiated subcontracts in excess of $100,000 thereunder.

"(3)(A) The Administrator, after consultation with the Board, may exempt classes or categories of contractors and subcontractors from the requirements of this section;

"(B) The Administrator, after consultation with the Board, shall establish procedures and criteria for the waiver of the requirements of this section with respect to individual contracts and subcontracts; and

"(C) Under the procedures and criteria established under subparagraph (B), the head of any executive agency may waive the requirement of this section with respect to individual contracts or subcontracts if such a waiver is in the public interest.

"(g)(1) The single system of Government-wide procurement regulations shall include regulations for the implementation of cost-accounting standards promulgated under subsection (f). Such regulations shall require any contractor or subcontractor as a condition of contracting with the United States to—

"(A) disclose in writing the cost-accounting practices of such contractor or subcontractor, including methods of distinguishing direct costs from indirect costs and the basis used for allocating indirect costs; and

"(B) agree to a contract price adjustment, with interest, for any increased costs paid to such contractor by the United States because of the failure of the contractor to comply with duly promulgated cost-accounting standards or to consistently follow the disclosed cost-accounting practices of such contractor.

"(2) The interest rate applicable to the price adjustment shall be the annual rate of interest established under section 6621 of the Internal Revenue Code of 1986 for such period. Such interest shall accrue from the time payments of the increased costs are made to the contractor or subcontractor to the time the United States receives full compensation for the price adjustment. If the parties fail to agree as to whether the contractor or subcontractor has complied with cost-accounting standards, the rules and regulations relating thereto, and cost adjustments demanded by the United States, such disagreements shall constitute a dispute under the Contract Disputes Act (41 U.S.C. 601 et seq.).

"(h)(1) Except as provided in paragraph (3), prior to the promulgation under this section of cost-accounting standards, and modifications thereof, the Administrator, following consultation with the Board, shall—

"(A) take into account—

"(i) the probable costs of implementation including inflationary effect, if any, compared to the probable benefits;

"(ii) the advantages, disadvantages, and improvements anticipated in the pricing, administration, and settlement of contracts; and

"(iii) the scope of, and alternatives available to, the action proposed to be taken;

"(B) prepare and publish a report in the Federal Register on the issues reviewed under paragraph (1)(A);

"(C)(i) publish an advanced notice of proposed rulemaking in the Federal Register in order to solicit comments on the report prepared pursuant to paragraph (1)(B);

"(ii) provide all parties affected a period of not less than 60 days after such publication to submit views and comments;

"(iii) during such 60-day period, consult with the Comptroller General and consider any recommendation of the Comptroller General; and

"(D) publish a notice of proposed rulemaking in the Federal Register and provide all parties affected a period of not less than 60 days after such publication to submit views and comments.

"(2) Rules, regulations, cost-accounting standards, and modifications thereof shall have the full force and effect of law, and, except as provided in paragraph (3), shall become effective no sooner than 120 days after publication in the Federal Register in final form. Implementation dates for contractors and subcontractors shall be determined by agreement with the applicable Federal agency, but in no event later than the beginning of the second fiscal year of the contractor or subcontractor after a standard becomes effective. Rules, regulations, cost-accounting standards, and modifications promulgated by the Administrator shall be accompanied by prefatory comments, and by illustrations if necessary.

"(3) The requirements of paragraph (1) and the effective dates in paragraph (2) shall be waived if the Administrator determines that urgent and compelling circumstances make compliance with such requirements impracticable. A cost-accounting standard or modification of a cost-accounting standard for which the requirements of paragraphs (1) and (2) are waived shall be effective on a temporary basis provided that the Administrator—

"(A) publishes a notice of such cost-accounting standard or modification of a cost-accounting standard in the Federal Register and includes a statement that the cost-accounting standard or modification of a cost-accounting standard is temporary;

"(B) provides for a public comment period of not less than 30 days beginning on the date that the notice is published;

"(C) takes into account—

"(i) the probable costs of implementation, including inflationary effects, if any, compared to the probable benefits;

"(ii) the advantages, disadvantages, and improvements anticipated in the pricing, administration, and settlement of contracts; and

"(iii) the scope of, and alternatives available to, the action proposed to be taken; and

"(D) prepares and publishes a report in the Federal Register on the issues reviewed under paragraph (C) as part of the notice of final rulemaking.

"(4) The functions exercised under this section are excluded from the operation of sections 551, 553 through 559, and 701 through 706 of title 5, United States Code.

"(i) The Administrator, after consultation with the Board, shall report to the Congress no later than 1 year after the date of enactment of this section, and annually thereafter, with respect to the activities and operations of the Board under this section, together with any appropriate recommendations.

"(j)(1) All cost-accounting standards, interpretations, modifications, rules, and regulations promulgated by the Cost-Accounting Standards Board under section 719 of the Defense Production Act of 1950 (50 U.S.C. App. 2168) shall remain in effect unless amended, superseded, or rescinded by the Administrator pursuant to this section.

"(2) Cost-accounting standards in effect before the date of enactment of this section referred to in paragraph (1) shall be subject to the provisions of this section in the same manner as if promulgated by the Administrator under this section.

"(3) The Administrator, under the authority set forth in section 6 of this Act, shall ensure that costs which are the subject of cost-accounting standards promulgated under this section shall not be subject to regulations that are established by another executive agency that differ from such standards with respect to the measurement, assignment, and allocation of such costs.

"(k) For purposes of determining whether a contractor or subcontractor has complied with cost-accounting standards and has followed consistently the disclosed cost-accounting practices, any authorized representative of the head of the agency concerned, of the offices of inspector general established pursuant to the Inspector General Act of 1978, or of the Comptroller General of the United States may examine and make copies of any documents, papers, or records of such contractor or subcontractor relating to, and solely for the purpose of ensuring compliance with such cost-accounting standards.

"(l)(1) There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this section.

"(2) Section 719 of the Defense Production Act of 1950 (50 U.S.C. App. 2168) is repealed.".

PROFIT METHODOLOGY STUDY

SEC. 5. (a) The Administrator shall conduct a study to develop a consistent methodology which executive agencies shall use for measuring the profits earned by Government contractors on procurements, other than procurements where the price is based on adequate price competition or on established catalog or market prices of commercial items sold in substantial quantities to the general public.

(b) The methodology developed under subsection (a) shall include adequate procedures for verifying and maintaining the confidentiality of financial data of contractors.

Reauthorization of the Office of Federal Procurement Policy
Summary of bill

- Reauthorizes the OFPP for four more years-from fiscal 89 to fiscal 93.

  The Administrator of OFPP, appointed by the President and confirmed by the Senate, shall be responsible for overall direction of procurement policy, a two hundred billion dollar a year policy function.

- Clarifies the Administrator of OFPP's authority to initiate as well as respond to changes in federal acquisition regulations, procedures, and forms.

- Establishes a Federal Acquisition Regulatory Council. The Council will consist of the Administrator of OFPP, and the top acquistion officials of the General Services Administration, the Department of Defense, and the National Aeronautics and Space Administration. Top acquistion officials shall be either the head of the agency, their designee, or an official assigned by statute.

- Assigns the Council responsibilities for coordinating procurement regulatory activities. Members of the Council shall jointly issue and maintain the Federal Acquisition Regulation. The Administrator, in consultation with the Council shall ensure that procurement regualtions promulgated by the executive agencies are consistent with the FAR. The Council shall manage modifications in the FAR and publish a report every six months on the status of new and revised procurement regulations.

- Establishes a Cost Accounting Standards Board within the OFPP. The Board shall consist of five members.The Administrator shall serve as Chairman. One shall be appointed by the Administrator of GSA, one by the Secretary of Defense, and two by the Administrator from private industry and the accounting profession respectively.

  The Administrator, after consultation with the Board, shall have the exclusive authority to make, promulgate, amend, and rescind cost-accounting standards designed to achieve uniformity in the allocation of costs to government contracts. The FAR shall include regulations for the implementation of cost-accounting standards.

- Assigns OFPP responsibility for conducting a study to develop a consistent methodology which executive agencies shall use for measuring the profits earned by contractors on procurements other than those based on price competition or established market prices.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

OFFICE OF FEDERAL
PROCUREMENT POLICY

STATEMENT OF ROBERT P. BEDELL

ADMINISTRATOR FOR FEDERAL PROCUREMENT POLICY

BEFORE THE

SUBCOMMITTEE ON FEDERAL SPENDING, BUDGET, AND ACCOUNTING

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS

MARCH 25, 1988

Mr. Chairman and Members of the Subcommittee:

I appreciate the opportunity to testify today, especially before you, Mr. Chairman, and to set forth the Administration's support for the authorization of the Office of Federal Procurement Policy (OFPP) to receive further appropriations. S. 2510, which you introduced in the 93rd Congress on October 1, 1973, led to the passage and enactment of P.L. 93-400, the Office of Federal Procurement Policy Act, in August 1974. Your interest in the OFPP has not waivered over these last 7 Congresses.

My prepared remarks are organized into four basic parts: (1) a very brief summary of the OFPP and its activities since 1974; (2) a discussion of OFPP's primary accomplishments since its last

reauthorization in 1983; (3) a review of the OFPP agenda we have developed since I became Administrator in November 1986, and (4) a discussion of the specific issues noted in your letter of March 16, 1988.

I.

Background

This is the third time that OFPP's authorization to receive additional appropriations has been considered by Congress. When P.L. 93-400 was passed in 1974, it authorized appropriations for OFPP for a five year period ending in 1979. The initial charter of the office was to provide overall leadership and direction in bringing about economies and efficiencies in the Federal procurement system.

In 1979, OFPP was authorized to receive appropriations for four additional years, through FY 1983 (P.L. 96-83). You, Mr. Chairman, chaired the Senate's hearing on that legislation. Among other things, P.L. 96-83, directed the office to develop and submit to Congress a proposal for a Uniform Federal Procurement System (UFPS). A UFPS proposal was drafted by OFPP and submitted to Congress in 1982.

In 1983, Senators Cohen and Roth introduced S. 1001, the OFPP reauthorization bill for FY 1983. You and Senator Levin were also sponsors of that bill. The resulting legislation, P.L. 98-191, authorized OFPP to receive appropriations through September 30, 1987.

As you know, The President has asked that OFPP continue its work. Today, the value of a procurement policy office that is not a part of a procuring agency is as great as it was at the time the office was established in 1974. Perhaps systemic procurement problems do not end. These problems include: overregulation, excessive paperwork, inordinately long procurement lead-times, insufficient issue coordination, and the need for greater competition in the award of contracts.

II.

Major Accomplishment of OFPP Since 1983

On December 1, 1983, President Reagan signed "The Office of Federal Procurement Policy Act Amendments of 1983," Public Law 98-191. The President called it "an important component of my Administration's far-ranging efforts to reform the wasteful and inefficient procurement practices of the Federal Government." (Signing statement, December 1, 1983.)

Executive Order No. 12352

The implementation of Executive Order No. 12352, March 17, 1982, has been a major initiative of OFPP. The Executive Order required agency heads to improve Federal procurement practices and it directed OFPP to provide overall leadership in achieving the reforms.

OFPP's implementation of Executive Order No. 12352 is consistent with the basic functions of OFPP as provided in P.L. 98-191. They include:

1. "Providing leadership...in the establishment, development and maintenance of the single system of simplified Government-wide procurement regulations ...;" 41 U.S.C. 405(d)(1)

The original OFPP Act (P.L. 93-400) required the Administrator to develop a system of simplified and uniform procurement policies, regulations, procedures and forms. In response to that requirement, OFPP initiated the Federal Acquisition Regulation (FAR) project in January 1978, and provided policy oversight and assistance throughout the development of the FAR. The FAR project called for the National Aeronautics and Space Administration (NASA), the General Services Administration (GSA), and the Department of Defense (DOD) to consolidate their common procurement regulations into a single simplified FAR.

DOD, NASA and GSA, the three agencies with statutory authority to issue procurement regulations, provided most of the resources for developing the FAR system. The Memorandum of Agreement (MOA), signed on August 2, 1982, embodied their plans for completion, implementation, and maintenance of the FAR.

The FAR was published in the September 19, 1983 Federal Register and became effective on April 1, 1984. Today, the FAR is maintained jointly by DOD and NASA through the Defense Acquisition Regulatory Council and by GSA through the Civilian Agency Acquisition Council. The FAR represents perhaps the most significant procurement reform initiative implemented by OFPP in its first 10 years.

OFPP's 1983 reauthorization legislation, P.L. 98-191, provided regulatory authority for OFPP. It authorized the Administrator to issue regulations when DOD, GSA and NASA were unable to agree on, or when they did not issue Government-wide regulations in a timely manner. OFPP Policy Letter 85-1, issued on August 19, 1985, established policies and procedures pursuant to which OFPP's regulatory authority would be exercised. In addition, that policy letter required the submission of data to

OFPP from the two FAR Councils on the maintenance of the FAR system.

We are continuing to evaluate ways to improve the process of developing procurement regulations and eliminating unnecessary regulations and paperwork. We are endeavoring to reduce the volume of procurement regulations -- particularly those regulations issued by agencies to supplement and implement the FAR -- and to reduce, where possible, the paperwork and other burdens associated with such regulations. For example, in 1987 we established an organization and procedure for reviewing all proposed procurement regulations and paperwork cases (cases submitted to OMB by the agencies for clearance under the Paperwork Reduction Act). In the past year, we reviewed 139 regulations and commented or recommended rescissions on 48 of them (35 percent). We also examined 68 procurement related paperwork cases and recommended changes to 32 (47 percent). We are emphasizing our paperwork and regulatory reviews; they are among our most important functions.

2. "Coordinating the development of Government-wide procurement system standards that shall be implemented by the Executive agencies in their procurement systems;" 41 U.S.C. 405(d)(2)

Section 1 of Executive Order No. 12352 required:

- o the heads of Executive agencies to "ensure timely satisfaction of mission needs at reasonable prices by establishing criteria to improve the effectiveness of procurement systems...,"

- o the heads of Executive agencies to "establish criteria for enhancing effective competition and limiting noncompetitive actions...," and

- o the "procurement executive with agency-wide responsibility to oversee development of procurement systems, evaluate system performance in accordance with approved criteria...and certify to the agency head that procurement systems meet approved criteria...."

To assist in implementing these requirements and others assigned by the Executive Order, OFPP established the Executive Committee on Federal Procurement Reforms. This Committee, consisting of representatives from the eight largest Federal procuring agencies, developed model standards and criteria. Guidelines containing these standards were promulgated by OMB in February 1984. Appendix A of this statement provides a summary of the actions taken by the various agencies to implement the model criteria.

3. "Providing leadership and coordination in the formulation of Executive branch position(s) on legislation relating to procurement;" 41 U.S.C. 405(d)(3)

The major -- but certainly not the only -- item of procurement legislation enacted since OFPP's last reauthorization is the Competition in Contracting Act of 1984 (CICA) (P.L. 98-369). OFPP worked with Congress on this bill and, since enactment, OFPP has worked for its effective implementation.

In the last session of Congress, even after the passage of CICA in the 98th session, over 200 legislative proposals were introduced that concerned procurement. Several were enacted. They include amendments to CICA contained in the Fiscal Year 1987 Defense Authorization Act, and other amendments to the Small Business and Office of Federal Procurement Policy Acts. There were also several enactments that dealt with contractor fraud. In all, more than 100 additional pages of statutory law were enacted which directly affected the procurement process. Others have been taken up in the 100th Congress. OFPP has not always been as effective in providing Executive branch leadership on these legislative matters as I think it can be. The number and importance of these legislative proposals means that legislative matters will continue to be one of OFPP's most important programs and priorities.

The importance being placed on legislation is also evidenced by OFPP's current efforts to draft statutory proposals to implement two specific recommendations made by the President's Blue Ribbon Commission on Defense Management (The Packard Commission). The two recommendations call for legislation (1) to recodify all current Federal procurement statutes into, "a single greatly simplified statute applicable Government-wide," and (2) to extend the use of commercial products rather than products tailor-made to rigid military or Federal specifications. Legislative proposals to implement these recommendations have been drafted and are now being coordinated for review and clearance prior to submission to Congress. We plan to submit both proposals to Congress within the next several weeks.

4. "Providing for a computer-based Federal Procurement Data System which shall be located in the General Services Administration (acting as executive agent for the Administrator) and shall collect, develop, and disseminate procurement data;" [illegible] U.S.C. 405(d)(4)

One of OFPP's continuing statutory responsibilities (first provided in Public Law 93-400, and subsequently carried forward in Public Law 96-83, and Public Law 98-191), requires the establishment of a computer-based information system for collecting, developing and disseminating procurement data. The system was first activated at the beginning of 1979 and is operated now by the General Services Administration as a result of the provisions of P.L. 98-191. The Federal Procurement Data System (FPDS) now produces quarterly and annual reports that include data on key Federal procurement actions. An overview of the types of data available from the FPDS is provided in Appendix B.

OFPP chairs the FPDS Policy Advisory Board and continues to work with the Executive agencies and the Federal Procurement Data Center to refine and improve the automated system. The system was modified in April 1985 to incorporate new reporting requirements imposed by CICA. In August 1985, OFPP initiated a comprehensive review of the data system to confirm its structure, content and responsiveness to the needs of the Congress, the Executive departments and agencies, and the private sector. This review has now been completed and we have issued new reporting forms, and operating instructions. The new data system is expected to be operational at the beginning of FY 1989.

5. "Providing for a Federal Acquisition Institute which shall be located in the General Services Administration (acting as executive agent for the Administrator)...;" 41 U.S.C. 405(d)(5)

The Federal Acquisition Institute (FAI) works to improve the Federal procurement work force. Section 3 of Executive Order No. 12352 required the Director of the Office of Personnel Management (OPM), in consultation with the heads of Executive departments and agencies, to ensure that personnel policies and classification standards meet the needs for a professional procurement work force. FAI works closely with OPM in this effort.

During 1987, FAI requested the Office of Personnel Management (OPM) to conduct a formal review of the qualification requirements for Federal Contract Specialists (GS-1102) and offered FAI assistance in conducting the review. The request was supplemented with extensive data to support the case for professional qualification requirements along the lines that had been recommended by the President's Blue Ribbon Commission on Defense Management, The Packard Commission, in its final report to the President in June 1986. At OPM's request, FAI initiated and organized an interagency effort to assist OPM in drafting a new qualification standard for Federal Contract Specialists. The actual job of preparing a draft standard was assigned to a task group under the FAI's Interagency Procurement Career Management Committee (IPCMC).

The final version of the proposed standard was forwarded by FAI to OPM in early February, 1988. OPM expects to issue the revised qualification standard during the spring of 1988. This standard will require candidates for entry into Contract Specialist positions to have at least 24 collegiate semester hours in business and/or law-related subjects, or the equivalent in experience. This is only the first step in the movement toward full-professionalization of contracting positions in the Federal Government.

Concurrent with issuance of the new qualifications standards for contracting positions, FAI is actively working with OPM in the development and validation of an enhanced competitive examination for entry-level contract specialists. This examination will, among other things, test many of the business and law-related subject areas necessary for satisfactory professional performance in this field.

6. "Establishing criteria and procedures to ensure the effective and timely solicitation of the viewpoints of interested parties in the development of procurement policies, regulations, procedures and forms;" 41 U.S.C. 405(d)(6)

OFPP Policy Letter 83-2, issued in May 1983, entitled "Publicizing the Development of Procurement Policies and

Regulations" sets forth the methods and criteria that are used to obtain the views of interested parties. This policy letter provides that the views of all interested parties be, "solicited and considered by each Executive agency proposing to develop or amend a procurement policy, regulation, procedure or form." This policy was defined to apply to all "significant" proposed procurement polices, regulations, procedures and forms; i.e., "any proposal that had an effect beyond the internal operating procedures of the issuing agency or a cost or administrative impact on contractors."

The policy letter also required that significant proposed changes to procurement policies, regulations, procedures and forms be published in the Federal Register for no less than 30 days to afford interested parties an opportunity to comment on them. Similar requirements were enacted into law by Public Law 98-577, "The Small Business and Federal Competition Enhancement Act of 1984" on October 30, 1934 as amendments to the OFPP Act.

In addition to the publication procedures required by P.L. 98-577, a large part of OFPP's day-to-day activities deal with the public discussion, review and debate of procurement issues. Since becoming Administrator, I have made over 40 speeches before various procurement audiences. My Deputy and other staff members have given numerous other talks. A special meeting on competition was held on October 1, 1987.

Representatives from six major industry associations participated and offered various recommendations for improving competition. The recommendations have been evaluated and several are being considered for further review and possible implementation. These include (1) eliminating the presumption, currently permitted by the FAR, that a synopsis of a procurement action has been published in the Commerce Business Daily (CBD) ten days after it was mailed; (2) improving the CBD's numbered notes system, and (3) increasing the use of commercial products.

The public has--and will continue to have--an active, important role in helping OFPP establish procurement policy.

7. "Developing standard contract forms and contract language in order to reduce the Government's cost of procuring property and services and the private sector's cost of doing business with the Government, and;" 41 U.S.C. 405(d)(7)

The development and implementation of the FAR on April 1, 1984 resulted in a reduction of approximately 50 percent in the number of pages of agency and departmental primary procurement regulations (from about 64,000 pages to 32,000). This reduction in the number of regulations also has resulted in increased standardization of forms and clauses. Obviously, with some 32,000 pages of primary regulations remaining, (not counting an unknown number of lower tier regulations) much more can and should be done in this area. The first step -- the issuance of the FAR -- was an important step, but other steps are now being taken.

Working with OMB's Office of Information and Regulatory Affairs (OIRA), we are now examining every procurement regulation submitted to OIRA in accordance with Executive Order No. 12291, and each request for clearance of procurement paperwork submitted in accordance with the Paperwork Reduction Act. In addition, we are analyzing all proposed procurement regulations which are published in the Federal Register for public comment. We also review those regulations that appear in the Federal Register in final form. We plan soon to expand our reviews to include existing as well as proposed procurement regulations, and to seek better ways of alerting the public to pending regulatory changes. Although this Administration has reduced the number of pages of primary procurement regulations by 50 percent during the past few years, the Federal procurement system is still hampered by overregulation. A substantial portion of OFPP resources will be focused on reversing this condition during the remainder of this Administration.

8. "Completing action, as appropriate, on the recommendations of the Commission on Government Procurement." 41 U.S.C. 405(d)(8)

The Commission on Government Procurement (COGP) proposed 149 specific recommendations in 1972 for improving Federal procurement. The Commission's number one recommendation was to establish OFPP. One of OFPP's basic responsibilities since its establishment has been to oversee the review and proper disposition of the Commission's recommendations. As of the end of 1983, 24 of the original 149 recommendations remained in process - 125 had been completed. Since that time, action on eleven of the 24 remaining recommendations has been completed; 13 are still pending. Of the 13 remaining recommendations, eight concern patents, technical data and copyrights. The remaining five pertain to: multiyear contracting authority, sales of elephantine tools, socio-economic program impacts on the procurement process, elimination of cost sharing in research and development contracts, and reporting requirements associated with extraordinary contract relief. The fact that these recommendations have not been completed after some 16 years since being proposed by the Commission in 1972, indicates that they are complex and controversial. Actions on the recommendations, are, however, being continued by OFPP.

Other Actions

In addition to the above, OFPP has taken other significant actions since 1983. Some of these include:

1. Competing Commercial Activities.

At the beginning of this Administration, many programs were identified that, if better managed, could save the taxpayers money. One such program was the commercial activities program defined in OMB Circular No. A-76.

This "make or buy" program requires the cost of government operated commercial activities to be compared to the costs of non-federal sources to determine who can provide the work in the most cost effective manner. Since 1981, over 72,000 full-time equivalent (FTE) positions have been competed with the following results:

- $696 million in annual cost reductions; over $9,600 per position studied;
- Cumulative cost reductions of $2.8 billion;
- 45,697 positions saved/shifted to higher priority needs;

These savings have been achieved, without loss of quality service, by using a new approach to the way the Government "does business" in both management and service contracting. We have discovered that whether the commercial work is thereafter done by the Government or by private contractor, the Government saves money: about 30 percent for each position studied.

While the results to date have been impressive, we estimate that the number of FTEs reviewed represents less than 10 percent of the FTEs that could be studied. The benefits of this program are real and too important not to receive our best efforts. Therefore, in November 1987, the President issued Executive Order No. 12615, "Performance of Commercial Activities," to accelerate progress under A-76. The Executive Order requires the following:

- Significant increases (threefold or more) to the annual study goals.
- Identification of all commercial activities by April 30, 1988 and new schedules, for FY 1989 and beyond, developed by June 30 1988.
- Agencies must subtract from their annual budget proposals, estimates of expected savings from the program. They may retain 25 percent of first year savings, to be used exclusively for employee bonuses or for other productivity enhancement projects.
- The Office of Personnel Management must develop new policies to allow Government managers to be more competitive and to reduce any adverse impact of productivity improvements on the employees.

We will be working closely with OMB's new Associate Director of Privatization to implement the President's agenda.

2. Conducting Special Studies.

Public Law 98-191 -- our 1983 reauthorization Act-- required OFPP to study and report to Congress on specific procurement issues. Three such studies were required by Public Law No. 98-191 (1) the end-of-year spending practices of the Department of Defense; (2) the extent of competition in the award of subcontracts by Federal prime contractors; and (3) the Department of Defense's spare parts procurement practices. Reports were submitted to Congress on the results of each of these studies during 1984. A fourth study was required by P.L. 98-369, the Competition in Contracting Act, concerning the procurement of professional services by Federal agencies. This study was completed and submitted to Congress in January, 1985. A fifth report, submitted to Congress on July 1, 1985, was required by Section 503 of the Small Business and Federal Procurement Competition Enhancement Act of 1984 (Public Law 98-577). This report required OFPP to study the desirability and feasibility of the various methods that may be used to qualify competitive sources for subsystems, assemblies and components acquired as part of major systems. A sixth report was required to comply with Section 202 of Public Law 99-234, The Federal Civilian Employee and Contractor Travel Expenses Act of 1985. The purpose of this report was to determine the advisability of placing further limits on policies governing relocation payments made to Federal contractors and to determine whether policies for contractor relocation should be revised to conform with the policies governing the relocation of Federal employees. OFPP's report on this study was submitted to Congress on September 2, 1986.

The research, time and staff resources committed to completing these required studies and reports constituted one of OFPP's major efforts since the last reauthorization.

3. Testing Innovative Procurement Methods.

Section 15 of the OFPP Act, as amended in 1983, authorizes the Administrator to develop innovative procurement methods to be tested by selected Executive agencies. The test programs must be approved by the heads of the agencies selected to carry out such tests and if any program requires a waiver of any statutory requirements, the Administrator must request congressional action to waive the statute. In April 1984, OFPP asked for agency suggestions for test programs and received 41 suggestions. Two of the suggestions have been developed into proposals and tests of them are now underway.

(a) Use of Bank Cards for Small Purchases

In 1985 OFPP authorized the Department of Commerce to undertake a test of a general purpose bank card for small purchase requirements (up to $2,500) in its National Oceanographic and Atmospheric Administration (NOAA) operations. The test was to determine whether use of the bank cards would simplify administrative support for program delivery, improve cash management, provide better management information and improve administrative productivity -- all with no significant loss of financial control or incurrence of unjustifiable expenses.

The one-year pilot test began in October 1986, when 500 bank cards and detailed instructions for use were provided to a preselected group of NOAA employees working in that agency's Kansas City region. The project was carried out in three phases, each introducing use of the card to additional employees. In phase II and III, the bank card was introduced at other NOAA regional centers, other Commerce bureaus, and at a few other agencies. Quarterly reports were provided to OFPP throughout the test.

As indicated in the final report (October, 1987), the pilot test met or exceeded all major test parameters. The test showed that bank cards are cost effective, enhance the effectiveness of the procurement process and require less paperwork, lower cash holdings, no invoicing, and fewer monthly bills than bills for each purchase. Approximately 5,000 cards are now in use. The test demonstrated that the bank card procedure reduces imprest fund and small purchase transaction costs, while improving process controls. The test has been approved for expansion throughout the executive branch in FY 1989.

(b) Electronic Requisitioning

DOD has a test underway for electronic requisitioning, ordering, and obligating under indefinite delivery-type contracts at the Defense General Supply Center. The test replaces internal and external "hard copy" documents for recording each transaction with an automated system, capable of being audited. This test may be a forerunner to a "paperless procurement system."

A third test plan was developed in 1984 by the Civilian Agency Acquisition Research Council (CAARC), chaired by the General Services Administration. The test would simplify small purchases by examining the savings and effects of raising the thresholds for certain statutory requirements to $25,000, to coincide with the present small purchase limitations. Those requirements include wage determinations under the Davis-Bacon and Service Contracts Acts. The Department of Defense, which is also interested in this test, worked with GSA, NASA, and the CAARC to complete the plan. The request for statutory waivers to conduct the above test was introduced May 1, 1986, as S. 2392.

That bill was not enacted by the 99th Congress. We hope that the 100th Congress will enact it.

4. Other Specific Initiatives.

- Foreign Acquisition/Trade Issues.

  Trade policy is receiving more and more attention within OFPP. Various codes have been adopted under the General Agreement on Tariffs and Trade (GATT). One that relates to OFPP directly is the Government Procurement Code, a part of the Trade Agreements Act of 1979. Implementation was accomplished under E.O. 12260 dated December 31, 1980 and was effective January 1, 1981. FAR implementation is included under FAR Part 25 - Foreign Acquisition.

  OFPP activity in the Trade area focuses on (1) uniform implementation of the code requirements by our trading partners; (2) collection of appropriate Federal Procurement Data System data in accordance with code requirements; and (3) review of Buy American legislation and effectiveness of regulations. As a member of the Trade Policy Subcommittee, U.S. Trade Representative's Committee on Government Procurement, OFPP also reviews requested waivers and exemptions, policy issues on specific commodities or products, and actions of the 19 other code signatories in adhering to the spirit and intent of the code.

Our participation in trade issues has been particularly active recently in working with the U.S. Trade Representative, executive agencies, and the Congress on H.R. 3, the Omnibus Trade Bill. We have also developed guidance to help provide for the uniform and consistent implementation of Section 109 of the Joint Continuing Resolution Making Further Continuing Appropriations for FY 1988, Public Law 100-202. Section 109 prohibits the expenditure or obligation, during FY 1988, of Federal funds to enter into contracts for public works projects with Japanese owned or controlled firms. The OFPP guidance on Section 109 was issued March 17, 1988.

Small Business Issues.

We recently testified, at hearings held by the Senate Small Business Committee on S. 1993, in favor of reforming the minority business development, or "8(a)", program. At the same time, we provided comments on H.R. 1807, a legislative proposal similar to S. 1993 and directed at the same Congressional objective. We believe that involvement in the Federal contracting process is a critical part of the business development aspects of the 8(a) program, and are working closely with the Committee staff to establish a more effective and efficient program.

In addition, our effort to reduce procurement regulatory and paperwork burdens has particular significance for small businesses since these burdens can be especially onerous for such firms. We believe it is much more difficult for small than large businesses either to understand and comply with these requirements, or to influence and shape them. Reducing these burdens will help to open more opportunities for small firms to successfully compete for Government business.

- The Simplified Competitive Acquisition Technique (SCAT) Proposal.

On September 25, 1985, OFPP submitted a proposal to Congress to establish a simplified competitive acquisition technique. The SCAT proposal was intended to address three basic problems associated with the acquisition process: (1) acquisitions take too long; (2) too many acquisitions are not competitive; (3) procurement authorities and responsibilities are sometimes fragmented. While the SCAT proposal has not been enacted, OFPP is still concerned about the need to simplify the acquisition process, particularly for commercial-type items and services. Accordingly, a new commercial products legislative proposal has been drafted. The new proposal emphasizes commercial-style competition and is being coordinated within the Executive branch. Our plan, as previously indicated, is to submit it to the Congress within the next several weeks.

- Procurement Automation.

OFPP chairs the Procurement Automation Council (PAC) that has responsibility to help increase the effectiveness of procurement automation. The purpose of the program is to promote and implement cost-effective automation technology throughout the Federal procurement community and to reduce interagency and intra-agency duplication of procurement automation efforts.

- OFPP Policy Letters and OMB Circulars.

Since 1983, OFPP has issued the following policy letters and circulars.

(a) OFPP Policy Letter 84-1, April 4, 1984, concerning Federally-Funded Research and Development Centers. This policy letter provided Government-wide policies for the establishment, use, periodic review and termination of the sponsorship of Federally-Funded Research and Development Centers (FFRDCs).

(b) OFPP Policy Letter 85-1, August 19, 1985, Federal Acquisition Regulations System. This policy letter implemented requirements of the OFPP Act concerning the definition and maintenance of the single system to simplify Government-wide procurement regulations.

(c) OMB Circular No. A-114, Management of Federal Audiovisual Activities, March 20, 1985. This revised circular updated Government-wide audiovisual management and procurement policies. This policy was audited by the General Accounting Office in 1985 and was generally found to be working successfully in the civil agencies of the Government.

(d) OMB Circular No. A-131, Value Engineering Programs. Working with Senator Levin, OFPP developed a new OMB circular on value engineering. The new circular requires agencies and departments to establish and use value engineering programs, where appropriate to reduce nonessential costs and improve productivity. The circular was issued February 3, 1988.

III.

Upcoming OFPP Agenda

While significant progress has been made in the last four years, much remains to be done.

Don Sowle, my predecessor at OFPP, resigned in December, 1984. I was appointed by the President to be Administrator of OFPP on September 9, 1986 and confirmed by the Senate on

October 8, 1986. I was sworn in as Administrator by the Vice President on November 14, 1986.

Between confirmed Administrators, many of the tasks described earlier were carried forward or successfully completed. The office was active. But the absence of an Administrator meant that OFPP's agenda was less bold-- understandably -- than with a confirmed Administrator. I said during my confirmation hearings in the Senate that my first efforts, if confirmed, would be to rebuild the OFPP staff with people from OMB and others of the highest quality I could find to complement the core of fine professionals that had held the office together. The second task would be to formulate our agenda for the office and get it moving. I have hired several new staff members and have developed an agenda with some new areas of emphasis and some items that are familiar.

In your letter inviting me to appear today, Mr. Chairman, you asked me to address several issues, including the authority of the Administrator to initiate regulations and policies. I will discuss later why I believe that the Administrator's existing authority is sufficient, but at this point I want to mention that, in addition to a proper statutory base, support within the Administration is essential to getting our job done. In my view, it is most important if you are running a program in OMB to have the interest and support of the Director and Deputy Director of OMB, and the White House. I have had that support from Jim Miller and Joe Wright at every turn. What we have done and whatever we do at OFPP in the coming months has been and will be because of their personal support and the support of the President's Task Force on Regulatory Relief, chaired by the Vice President. Largely because of it, I believe that OFPP's present statutory authority is adequate.

Support is often reflected in budget requests. I was very pleased with the President's request and Congress' approval of OFPP's FY 1988 budget. I believe our FY 88 budget reflects the President's and Congress' continued interest in our agenda and in improving the Federal procurement process. The FY 88 request represented a greater than 50 percent increase over the FY 1987 OFPP budget. While more than a 50 percent increase sounds like a lot, especially in today's fiscal environment and particularly for an office in the Executive Office of the President, it was not a large increase, in dollar terms, (approximately $830,000) and was still less in real terms than previous budgets.

Our FY 89 budget request reflects a 2.3 percent increase ($53,000) over our FY 88 appropriated level. (A copy of my March 3, 1988 statement before the Subcommittee on Treasury, Postal Services and General Government, House Committee on Appropriations is attached at Appendix C). The requested increase is necessary to cover pay raises and a slight inflationary increase for other services. In "real" or 1989 constant dollars, the FY 89 request is still below (approximately $1.5 million) OFPP's funding level ten years ago. It will, however, allow us to maintain our current authorized staffing level of 32 and to carry out our agenda and the reform initiatives of the Administration and Congress. The agenda includes our efforts to:

- coordinate the Administration's review of all procurement matters;
- rescind or repeal unnecessary regulations;
- restore the authority of contracting officers by establishing short, unambiguous lines of authority;
- draft a consolidated, simplified procurement statute -- applicable Government-wide;
- simplify contracting procedures -- increase the potential for competition -- while favoring the purchase of commercially available items;
- streamline the regulatory development process; and
- improve procurement data collection; improve the procurement work force; streamline the procurement process through more use of automation; and make use of test authorities to try out new, more efficient ways of doing business.

I will elaborate on a few of these items.

Reviewing Procurement Regulations

The President's Blue Ribbon Commission on Defense Management (the Packard Commission), in its 1986 report to the President, found that:

> "Over the years, Congress and DOD have tried to dictate management improvements in the form of ever more detailed and extensive laws or regulations. As a result, the legal regime for defense acquisition is today impossibly cumbersome. For example, we have identified 394 different regulatory requirements in the Federal Acquisition Regulation (FAR) and the DOD FAR supplement that are pegged to some 62 different dollar thresholds, ranging from as little as $15 to as much as $100 million or more. In our judgment, there can be far fewer of these requirements, and those that are retained can apply at far fewer dollar thresholds. The sheer weight of such requirements often makes well-conceived reform efforts unavailing. At operating levels within DOD, it is now virtually impossible to assimilate new legislative or regulatory refinements promptly or effectively."

While the Packard Commission Report dealt only with DOD, many of its conclusions, including the observation quoted above, apply to all procurement regulatory systems.

Those who wish to do business with the Federal Government know that this is true. The Federal procurement process is overregulated, paperwork intensive and buried in red tape. More legislation is not the solution. Today, there are over 4,000 provisions of law affecting the Federal procurement process. In the last two Congresses, more than a dozen major procurement laws were enacted, adding hundreds of pages of new statutory provisions. These legislative enactments have spawned over 100 cases for regulatory action before the two regulatory councils that develop regulations.

Some of these laws have introduced unnecessary burdens and complexities into the Federal procurement system, for example, provisions such as exhaustive lists of unallowable costs, certification of commercial prices, inconsistent technical data requirements, and piecemeal revisions to the Competition in Contracting Act of 1984.

Much of this legislation could be left to rulemaking. Often it is not well coordinated in Congress. The Senate, last session, for example, reported out 14 bills affecting procurement. Nine Committees currently are investigating procurement issues. The Governmental Affairs, Armed Services, Science and Transportation, Judiciary, Small Business, Commerce, Finance, Labor and Human Resources, and Energy and Natural Resources Committees all have procurement related matters under consideration.

Legislation spawns regulations and we are working with the Under Secretary for Acquisition at DOD in controlling and carrying out these regulatory authorities. We intend to work with that Department and with other Government agencies to rescind or repeal unnecessary regulations, significantly cut paperwork, and ensure that new regulations are not only necessary, but impose the least amount of burden and are as uniform and simple as possible. This is an ongoing and important task.

Restore the Authority of Contracting Officers.

The Packard Commission also recommended that there be "shorter unambiguous lines of authority" for Federal acquisition. The contracting officer should have as few constraints on the exercise of his or her authority as is possible and prudent. This can be done, in part, by eliminating counterproductive regulatory requirements and burdens.

Our proposed bill to enhance the acquisition of commercial products relies, in part, on The Packard Commission's proposition that the acquisition process can be substantially improved simply by giving contracting officials the leeway to operate more like their commercial counterparts -- to exercise initiative and creativity and to be held accountable for results. Restoring the ability of contracting personnel to get the job done and to use their judgment and common sense more frequently than now also would go a long way to attracting and retaining qualified and committed acquisition personnel.

Simplified Procurement Statute.

Another of the Packard Commission's recommendations to the President was to streamline Department of Defense organization and acquisition procedures. A key proposal by the Commission to achieve this goal was to develop a single, greatly simplified Government-wide procurement statute. The President assigned OFPP to work with the Department of Defense, General Services Administration and other Federal agencies on such a legislative proposal. Several drafts have been completed, and what I hope is a final draft is now being coordinated with the major agencies and departments. This proposal would greatly simplify and make more uniform the existing provisions of law that govern the Federal procurement process. Once put into effect, it should greatly reduce the costs to both the Government and contractors of doing business with the Government.

Government rights and technical data.

The Packard Commission also recommended the development of a single regulation to define rights in technical data and computer software. The Government may need technical data or rights in technical data to obtain competition among suppliers or to fulfill certain statutory responsibilities for disseminating and publishing the results of its funded research. When the Government must acquire technical data or rights in data developed by a contractor using private funds, then it has an obligation to protect such data and thereby avoid compromising the contractor's property and economic interests. This is also good policy from the Government's standpoint, since effective protection of technical data developed at private expense will encourage contractors to provide new technologies to the Government. The Government, also through its contracts, funds the development of technical data. The Government must then decide how such data can be used most effectively to meet the Government's immediate needs and to promote commercial application, which ultimately may make new and better products available to the Government market as well. We are working with the Defense Department and civilian agencies to develop a single set of regulations that will provide the necessary protection to technical data developed at private expense and promote the commercial application of technical data developed using Government funds.

Competition Enhancement.

The Competition in Contracting Act of 1984 established competition as the dominant procurement policy. The existing regulatory and paperwork requirements of the procurement policies sometimes undercut this effort. We should be unabashed competition advocates. We plan to work to structure more of our policies to support open, competitive procurements based upon performance requirements that set forth clearly the Government's minimum needs. This should include a distinct preference for the acquisition by the Government of commercially available products. We plan to develop specific proposals to implement these objectives.

The above items represent only some of the actions underway at OFPP. We believe that this agenda is a very ambitious undertaking and we will need the help and support of Congress in order to accomplish it. The agenda is not fixed, however, and we plan to work and to continue to consult with you and other interested members on it.

IV.

Specific Issues

In your March 16, 1988 letter, Mr. Chairman, you asked me to include four specific issues in my testimony. These issues are discussed below.

Federal Regulatory Council

In November 1985, the Director of OMB and the Acting Administrator of OFPP commissioned an independent review and analysis of the FAR system. The review was conducted by a Presidential Exchange Executive. The questions addressed by the review were to determine how well the system was working and ascertain what improvements could be made to the process.

This review was completed in December 1986. It indicated that the system was not working as well as originally intended. Two of the major problems noted were: (1) the procedures for developing and promulgating procurement regulations are too complex and cumbersome - on average it takes about 16 months to develop and issue a regulation; and (2) the management structure for overseeing the activities of the two existing FAR councils is not effective in coordinating the activities of the two councils. The review recommended that a new management structure be established to direct, coordinate and monitor the FAR process and to strengthen the control of its scheduling, prioritization of cases, productivity and output.

H.R. 3345 (the OFPP Reauthorization Bill now under consideration by the House Government Operations Committee) would establish a Federal Acquisition Regulatory Council. The Council, proposed by Section 4 of H.R. 3345, would consist of the Administrator of OFPP and the senior procurement policy officials of GSA, NASA and DOD. The Council's duties would include joint responsibility for issuing and maintaining the FAR. Each individual member of the Council would also be responsible for: approving or disapproving their own agencies internal procurement regulations, carrying out procurement-related paperwork reduction responsibilities for their agencies, and eliminating or reducing the level of review in their agencies procurement systems.

The establishment of a Federal Acquisition Regulatory Council should help improve the management of the existing Federal Acquisition Regulations System. The Council would bring increased high-level management attention to the FAR system. We do not believe that the Council in H.R. 3345 would supplant the existing Defense Acquisition Regulatory

Council or the Civilian Agency Acquisition Council. The FAR Regulatory Council would, in effect, oversee these councils. We also believe that this Council does not add to or subtract statutory authority of any agency. It is simply a coordinating and managing device that will bring higher level attention to procurement regulatory matters.

Should OFPP Have Additional Regulatory Authority?

The question of whether and what authority OFPP should have to issue and rescind regulations concerning procurement has been debated in each of OFPP's two prior reauthorizations and in the legislation establishing OFPP in 1974. Public Law No. 93-400 gave the Administrator for Federal Procurement Policy authority to prescribe regulations in accordance with applicable law. This authority was revoked when OFPP was reauthorized in 1979 (P.L. 96-83). Instead, OMB was given the authority to rescind rules pertaining to procurement, under certain circumstances while OFPP was drafting a Uniform Procurement System.

When OFPP was reauthorized in 1983 (P.L. 98-191) Congress partially restored OFPP's regulatory authority. The 1983 amendments to the OFPP Act gave OFPP the authority to issue regulations in the event DOD, NASA, and GSA failed to act or failed to agree in a timely manner. The authority of the OMB Director to rescind regulations that were determined by the Administrator to be inconsistent with policies prescribed pursuant to the OFPP Act was retained.

I believe that our existing regulatory authorities are both adequate and appropriate. OFPP has not been hampered by any shortcomings in the regulatory authority provided by the 1983 amendments. The Commission on Government Procurement, in recommending that the office be established, stated, "nor do we suggest a huge policymaking bureaucracy to issue all procurement regulations." I believe that OFPP's role today is essentially what the COGP and Congress envisioned over a decade ago.

This is not to say that OFPP is not interested in regulations. We are; regulations are very important. In my view, OFPP has regulatory authority and it is, as it should be - adequate and nothing more. While I would oppose reducing our current authorities, I would also oppose giving OFPP the authority to issue procurement regulations generally, without allowing DOD, NASA and GSA to act first.

Assessment of OFPP's Effectiveness

The General Accounting Office (GAO) completed an assessment of OFPP's effectiveness in September 1987. Its report, "Assessment of the Office of Federal Procurement Policy, GAO/NSIAD-88-35, was issued in November 1987.

GAO's general conclusion was that OFPP's performance, since our last reauthorization, has been uneven. The factors contributing to the unevenness, as reported by GAO, were: a lack of strong management and leadership at OFPP, inadequate support from OMB, a lack of staff resources and lengthy periods without a Presidentially appointed Administrator.

In concluding their report, GAO stated that the leadership and staffing problems in OFPP were being corrected and that OFPP was now more assertive in the exercise of its authority. I generally agree with GAO's assessment. The effectiveness of the office did suffer without a confirmed Administrator. As indicated previously, however, we now have the support of the President, the Vice President, the Director and Deputy Director of OMB. This support was reflected in our '88 budget and has largely enabled me to restaff our office. I believe the agenda we have established, is totally in line with our existing statutory authorities and responsibilities. The only new authority which we are actively seeking is a modification of our existing testing authority now contained in section 15(a) and (b) of the OFPP Act. We would like to work with Congress to modify and streamline our existing authority in this area.

Cost Accounting Standards Board

The final issue to be addressed pertains to the reestablishment and placement in OFPP of the functions previously performed under Public Law No. 91-379 by the Cost Accounting Standards (CAS) Board.

Since the expiration of the prior CAS Board in 1980, no new standards have been published, nor have modifications been made to existing ones. The 19 standards previously promulgated by the Board continue in effect. These standards were designed to achieve uniformity and consistency in the cost accounting practices followed by contractors and subcontractors under certain Defense contracts.

The 19 cost accounting standards deal primarily with the allocability of cost as distinguished from decisions as to what costs are allowable. The standards require that contractors, through specific disclosure requirements, demonstrate consistency in estimating, accumulating, reporting and allocating costs applicable to Government contracts. The current standards are covered in Part 30 of the FAR. This coverage includes such topics as disclosure requirements, contract requirements, and administration of the standards.

Over the last several years, DOD has assumed some of the responsibilities of the prior CAS Board concerning the maintenance of the standards. It has established a CAS policy group as part of its Defense Acquisition Regulatory Council. The major activity of this group involves the maintenance of the CAS standards, price adjustments, and voluntary changes. We also believe these functions should continue to be performed. There is a need for maintaining the standards and doing so consistently. We support legislation to create an appropriate standard setting process.

An appropriate cost accounting standards setting function could work well in several locations as long as it is placed within the Executive branch because of the Executive nature of the function. In my view, it could work well with DOD, GSA and NASA jointly developing FAR changes to the existing CAS Board standards. It could also work well located in OFPP or elsewhere.

The earlier CAS Board was composed of five members and chaired by the Comptroller General. It had a professional staff of 25. The resources required for a new Board, would of course depend on the scope of the Board. I urge that the effective date of any new Board not be earlier than the date funds are made available to run it.

V.

Conclusion

We are enthusiastic about OFPP's activities and agenda. We intend to continue working with the Departments and agencies and particularly the acquisition team at DOD, the team created by Congress in response to the Packard Commission's recommendations.

We hope that you and Congress agree with the desirability of authorizing OFPP to receive appropriations in future years.

I will be pleased to answer whatever questions you may have.

APPENDIX A

Name of Agency	Systems Criteria Are in Place	If Criteria Not In Place, Planned Date for Establishment	Procurement Executive Has Certified As To Systems Performance	If No Certification, Planned Date for Certification
ACTION	No	June 30, 1988	No	October 1, 1988
Department of Agriculture	Yes	Complete	Yes	Complete
Agency for International Development	Yes	Complete	Yes	Complete
U.S. Arms Control & Disarmament Agency	Yes	Complete	No	June 30, 1988
Department of Commerce	No	August 1988	No	September 1988
Central Intelligence Agency	Yes	Complete	Yes	Complete
Commodity Futures Trading Commission	Yes	Complete	Yes	Complete
Consumer Product Safety Commission	Yes	Complete	Yes	Complete
Department of Defense	Yes	Complete	Yes	Complete
Department of Education	Yes	Complete	No	September 30, 1988
Department of Energy	Yes	Complete	Yes	Complete
Equal Employment Opportunity Commission	Yes	Complete	Yes	Complete
Environmental Protection Agency	Yes	Complete	Yes	Complete
Federal Communications Commission	Yes	Complete	Yes	Complete
Federal Emergency Management Agency	Yes	Complete	No	FY 1988
Federal Home Loan Bank Board	Yes	Complete	Yes	Complete
Federal Labor Relations Authority	Yes	Complete	No	July 31, 1988
Federal Trade Commission	Yes	Complete	Yes	Complete

APPEND) (Con't)

Name of Agency	Systems Criteria Are in Place	If Criteria Not In Place, Planned Date for Establishment	Procurement Executive Has Certified As To Systems Performance	If No Certification, Planned Date for Certification
General Services Administration	Yes	Complete	Yes	Complete
Department of Health and Human Services	Yes	Complete	Yes	Complete
Department of Housing and Urban Development	Yes	Complete	Yes	Complete
U.S. Information Agency	No	September 30, 1988	No	November 30, 1988
Department of the Interior	Yes	Complete	Yes	Complete
International Trade Commission	Yes	Complete	Yes	Complete
Interstate Commerce Commission	Yes	Complete	Yes	Complete
Department of Justice	Yes	Complete	Yes	Complete
Department of Labor	Yes	Complete	Yes	Complete
Merit Systems Protection Board	Yes	Complete	Yes	Complete
National Labor Relations Board	Yes	Complete	Yes	Complete
National Aeronautics and Space Administration	Yes	Complete	Yes	Complete
National Science Foundation	Yes	Complete	Yes	Complete
National Transportation Safety Board	Yes	Complete	Yes	Complete
Nuclear Regulatory Commission	Yes	Complete	Yes	Complete
Office of Personnel Management	Yes	Complete	Yes	Complete
Overseas Private Investment Corporation	Yes	Complete	No	September 30, 1988
Panama Canal Commission	Yes	Complete	Yes	Complete

APPENDIX A (Con't)

Name of Agency	Systems Criteria Are in Place	If Criteria Not In Place, Planned Date for Establishment	Procurement Executive Has Certified As To Systems Performance	If No Certification, Planned Date for Certification
Railroad Retirement Board	Yes	Complete	Yes	Complete
Securities and Exchange Commission	Yes	Complete	Yes	Complete
Selective Service System	Yes	Complete	No	April 30, 1988
Small Business Administration	Yes	Complete	Yes	Complete
Smithsonian Institution	Yes	Complete	Yes	Complete
Department of State	No	June 30, 1988	No	December 31, 1988
Department of Transportation	Yes	Complete	Yes	Complete
Department of the Treasury	Yes	Complete	Yes	Complete
Veterans Administration	Yes	Complete	Yes	Complete

APPENDIX B

FEDERAL
PROCUREMENT
DATA
SYSTEM

PART I

FEDERAL PROCUREMENT OVERVIEW

1987

FISCAL YEAR 1987

(Dollars in Billions)

Number of Actions	22,299,606
Procurement Dollars	$197.3B

	Number of Actions		Dollars	
SF 279 (Over $25,000)	415,732	(1.9%)	$ 178.5	(90.5%)
SF 281 ($25,000 or Less)	21,883,874	(98.1%)	18.8	(9.5%)
	22,299,606		$ 197.3	

Federal Procurement Dollars
by Major Procurement Agencies
Fiscal Year 1987
(Dollars in Billions)

	Number of Actions	% Actions	Dollars	% $
DOD	15,300,857	68.6	$ 155.4	78.8
Energy	34,589	.2	13.9	7.0
NASA	98,848	.4	7.8	4.0
VA	2,131,590	9.6	3.2	1.6
USDA	1,198,120	5.4	2.2	1.1
GSA	562,863	2.5	2.1	1.0
HHS	866,524	3.9	1.5	.8
Transportation	273,715	1.2	1.6	.8
All Others	1,832,500	8.2	9.6	4.9
	22,299,606	100.0	$ 197.3	100%

Federal Procurement Dollars
by Major Product/Service Category
FY 1987
(Dollars in Billions)

Supplies and Equipment	$ 89.6
Services Excluding R&D Construction, A/E, ADP	42.3
Research and Development	27.0
Construction	13.1
Architect/Engineering Services	3.8
ADP Services	2.2
Real Property	.5
	$ 178.5
Actions $25,000 or Less	18.8
	$ 197.3

APPENDIX B (Con't)

4

Federal Procurement Dollars
Awarded Using Authority for
Less Than Full and Open Competition
FY 1987
(Dollars in Millions)

Authority for Less Than Full and Open Competition		Number of Actions	Dollars
1.	Unique Source	44,270	$ 35.741
2.	Urgency	7,102	3.805
3.	Mobilization/Essential R&D Capability	2,010	7.041
4.	International Agreement	651	.271
5.	Authorized by Statute/Authorized Resale	23,816	1.761
6.	National Security	3,963	1.843
7.	Public Interest	51	.089
		81,863	$ 50.551

Federal Procurement Dollars
Selected Socioeconomic Statistics
FY 1987
(Dollars in Billions)

Federal Procurement Dollars	$ 197.3
Dollars to Business Concerns	$ 170.6
Dollars to Large Business	135.2
Dollars to Small Business (Excluding Minority, 8a)	30.3
Dollars to Large and Small Minority	1.8
Dollars to 8(a) Firms	3.3
Dollars to Women-Owned Business	$ 1.5

*Excludes educational and non-profits, foreign military sales, tariff or regulated acquisitions $25k and under, DOD obligations $25k and under for orders against GSA schedules and other agencies contracts.

PART II

TRENDS IN FEDERAL PROCUREMENT DOLLARS

Federal Procurement Dollars

Fiscal Years 1979 - 1987

(Dollars in Billions)

	PROCUREMENT DOLLARS*	NUMBER OF ACTIONS*
1979	$ 94.4	16,921,933
1980	111.4	17,484,782
1981	139.6	18,348,224
1982	164.3	18,874,546
1983	171.2	21,189,144
1984	183.8	21,152,003
1985	199.8	21,580,205
1986	200.0	21,353,521
1987	197.3	22,299,606

*Prior to FY 1979, data on the number of Federal procurement actions and dollars are not available. However, the 1972 report of the Commission on Government Procurement estimated that in Fiscal Year 1972, procurement dollars totaled $57.5 billion.

Comparison of
Small Business Share of Federal Procurement to Business Concerns
FY 1980 - FY 1987

Year	Total Federal Obligations	Obligations to Business Concerns*	Obligations to Small Business*	Percentage of Small Business Obligations to all Business Concerns	Small Business Set-Aside
1980	$ 111.4B	$ 90.9B	$ 20.3B	22%	$ 5.6B
1981	139.6B	111.7B	24.9B	22%	6.9B
1982	164.3B	136.6B	29.3B	21%	9.2B
1983	171.2B	147.6B	29.2B	20%	9.2B
1984	183.8B	157.7B	32.7B	21%	14.2B
1985	199.8B	171.1B	33.1B	19%	15.6B
1986	200.0B	171.8B	36.3B	21%	16.5B
1987	197.3B	170.6B	35.4B	21%	16.7B

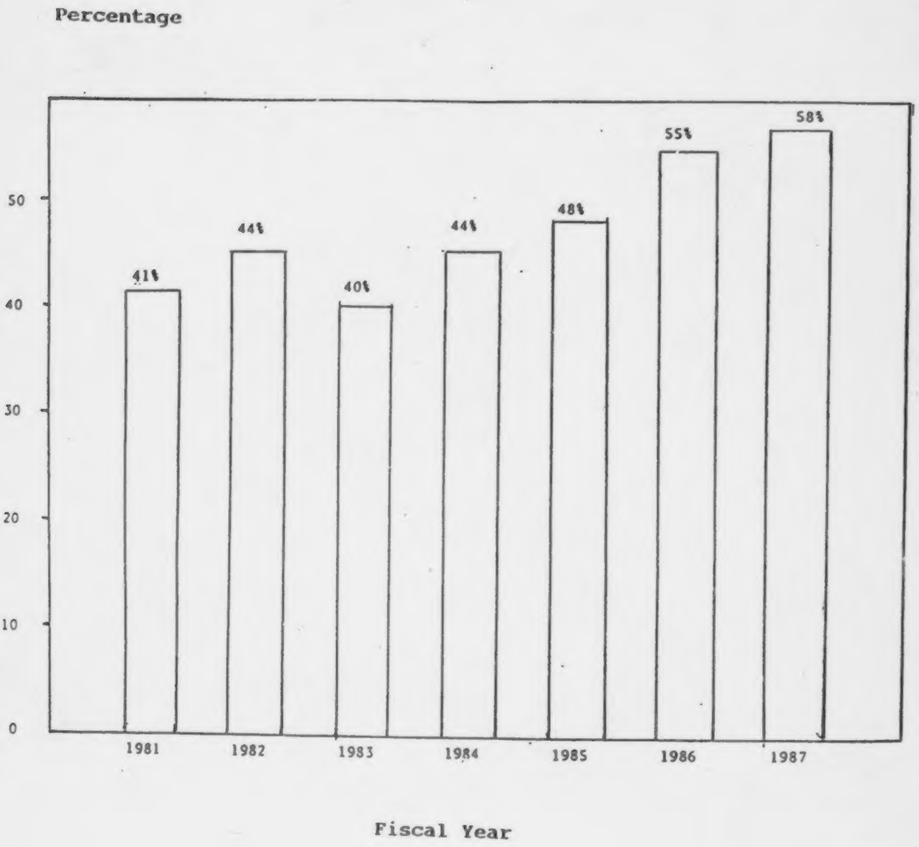
*Excludes:

- Foreign Military Sales
- Educational and Non-Profits
- Tariff or Regulated Acquisitions $25K and Under
- DOD Obligations $25K and Under for Orders Against GSA Schedules and Other agencies Contracts

Percentage of Governmentwide Procurement Dollars Awarded Competitively (FY 81 - FY 87)

	1981	1982	1983	1984	1985	1986	1987
USDA	92%	91%	90%	89%	91%	94%	94%
Transportation	67	91	65	63	91	86	84
GSA	80	84	84	84	86	92	88
HHS	66	66	69	71	75	75	69
NASA	65	64	61	66	68	67	65
VA	54	58	60	58	55	70	75
Defense	39	42	37	41	46	54	56
Energy	21	22	27	23	20	22	34
All Others	45	34	65	74	66	86	84
Federal Government	41	44	40	44	48	55	58

Percentage of Governmentwide Procurement Dollars Awarded Competitively



ATTACHMENT C

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

OFFICE OF FEDERAL
PROCUREMENT POLICY

HEARINGS
ON THE
FY '89 BUDGET REQUEST OF THE
OFFICE OF FEDERAL PROCUREMENT POLICY
BEFORE THE
HOUSE OF REPRESENTATIVES COMMITTEE ON APPROPRIATIONS
SUBCOMMITTEE ON TREASURY, POSTAL SERVICE AND GENERAL GOVERNMENT

MARCH 3, 1988

List of Witnesses

ROBERT P. BEDELL, ADMINISTRATOR

DR. ALLAN V. BURMAN, DEPUTY ADMINISTRATOR

DAVID F. BAKER, ASSOCIATE ADMINISTRATOR FOR MANAGEMENT CONTROLS

APPENDIX C (Con't)

STATEMENT
OF
ROBERT P. BEDELL
ADMINISTRATOR FOR FEDERAL PROCUREMENT POLICY
OFFICE OF MANAGEMENT AND BUDGET
BEFORE THE
SUBCOMMITTEE ON TREASURY, POSTAL SERVICE AND GENERAL GOVERNMENT
COMMITTEE ON APPROPRIATIONS
UNITED STATES HOUSE OF REPRESENTATIVES

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

I APPRECIATE THE OPPORTUNITY TO APPEAR BEFORE THE SUBCOMMITTEE TO DISCUSS THE FISCAL YEAR 1989 APPROPRIATION REQUEST FOR THE OFFICE OF FEDERAL PROCUREMENT POLICY. I AM ACCOMPANIED HERE TODAY BY DR. ALLAN BURMAN, OFPP'S DEPUTY, AND MR. DAVID BAKER, MY OTHER PRINCIPAL COLLEAGUE, WHO IS THE ASSOCIATE ADMINISTRATOR FOR MANAGEMENT CONTROLS.

THE PRESIDENT HAS REQUESTED $2,353,000 FOR OFPP IN FY 1989. THIS IS AN INCREASE OF $53,000 FROM THE APPROPRIATED FY 1988 LEVEL OF $2,300,000. THE FY 1989 REQUEST, WHICH MARKS A 2.3 PERCENT INCREASE OVER THE 1988 APPROPRIATED LEVEL, SHOULD BE ADEQUATE TO COVER CIVILIAN PAY RAISES AND A SLIGHT INCREASE DUE TO INFLATION FOR OTHER SERVICES. IN "REAL" OR 1989 CONSTANT DOLLARS, THE FY 1989 REQUEST IS STILL WELL BELOW (APPROXIMATELY $1.5 MILLION) OFPP'S FUNDING LEVEL TEN YEARS AGO.

THE PRESIDENT'S REQUEST FOR 1989 DEMONSTRATES THIS

ADMINISTRATION'S CONTINUING COMMITMENT TO OFPP AND TO IMPROVING THE PROCUREMENT PROCESS AS PART OF THE PRESIDENT'S OVERALL MANAGEMENT IMPROVEMENT PROGRAM. THE FUNDING REQUEST WILL ALLOW US TO MAINTAIN OUR CURRENT AUTHORIZED STAFFING LEVEL OF 32 SO THAT WE MAY VIGOROUSLY CARRY OUT OUR CHARTER AND SEE THAT THE RECENT REFORM INITIATIVES OF BOTH THE ADMINISTRATION AND CONGRESS TAKE HOLD.

THE PAST YEAR HAS BEEN A BUSY AND SUCCESSFUL ONE FOR THE OFFICE OF FEDERAL PROCUREMENT POLICY. WE HAVE ACCOMPLISHED MUCH IN OUR EFFORTS TO MAKE THE FEDERAL GOVERNMENT'S PROCUREMENT SYSTEM MORE EFFICIENT AND COST-EFFECTIVE. MY AGENDA SINCE I BECAME THE ADMINISTRATOR OF OFPP IN NOVEMBER, 1986 HAS BEEN TO STREAMLINE THE PROCUREMENT SYSTEM, TO GIVE AUTHORITY BACK TO THE CONTRACTING OFFICERS, AND TO REDUCE THE REGULATIONS, PAPERWORK, AND OTHER BURDENS THAT UNNECESSARILY CONSTRAIN THE SYSTEM. EACH OF THESE INITIATIVES HAS ITS ORIGIN IN THE RECOMMENDATIONS OF THE PRESIDENT'S BLUE RIBBON COMMISSION ON DEFENSE MANAGEMENT, CHAIRED BY DAVID PACKARD. OUR EFFORTS THIS YEAR, AS DESCRIBED MORE FULLY IN THE PRESIDENT'S MANAGEMENT REPORT WHICH WAS SUBMITTED TO CONGRESS THIS WEEK, HAVE RESULTED IN THE DRAFTING AND ISSUING OF MANY LEGISLATIVE PROPOSALS AND POLICY STATEMENTS, INCLUDING:

- FIVE LEGISLATIVE PROPOSALS -- THREE HAVE BEEN SUBMITTED TO CONGRESS, AND THE OTHER TWO ARE CURRENTLY IN THE FINAL OMB CLEARANCE PROCESS;

- EXECUTIVE ORDER 12615 ON THE PERFORMANCE OF COMMERCIAL ACTIVITIES;

- OMB CIRCULAR A-131 TO FOSTER GREATER USE OF VALUE ENGINEERING TECHNIQUES BY FEDERAL AGENCIES;

- TWO AMENDMENTS TO OMB CIRCULAR A-76 ON INFLATION FACTORS AND RETIREMENT COSTS; AND

- A COMPREHENSIVE POLICY ON CONTRACTOR RIGHTS TO TECHNICAL DATA, WHICH IS CURRENTLY BEING REVIEWED WITH THE AGENCIES.

WE HAVE ALSO WORKED EXTENSIVELY WITH CONGRESS ON A NUMBER OF MATTERS DURING THE PAST YEAR. I TESTIFIED BEFORE CONGRESSIONAL COMMITTEES ON SEVEN DIFFERENT OCCASIONS ON SUCH SUBJECTS AS THE BUY AMERICAN ACT, VALUE ENGINEERING, THE SMALL BUSINESS PRESERVATION ACT, CONTRACT BONDING ISSUES, AND OFPP'S REAUTHORIZATION. WE REVIEWED AND COMMENTED ON 186 PROCUREMENT OR PROCUREMENT-RELATED PIECES OF LEGISLATION. WE ALSO PROVIDED EXTENSIVE SUPPORT TO THE GENERAL ACCOUNTING OFFICE IN ITS REVIEW OF OFPP, AND ESTABLISHED A JOINT TASK FORCE WITH GAO AND THE DEFENSE DEPARTMENT TO DEVELOP A STANDARD METHODOLOGY FOR CONDUCTING STUDIES OF CONTRACTOR PROFITABILITY.

DURING LAST YEAR'S HEARING ON OFPP'S APPROPRIATIONS, I SAID

THAT ONE OF MY TOP PRIORITIES WOULD BE IN THE AREA OF REGULATORY REVIEW. I AM PLEASED TO REPORT THAT IN 1987 WE ESTABLISHED AN ORGANIZATION AND PROCEDURE FOR REVIEWING ALL PROPOSED PROCUREMENT REGULATIONS AND PAPERWORK CASES. IN JUST ONE YEAR'S TIME WE REVIEWED 116 REGULATIONS AND COMMENTED OR RECOMMENDED RESCISSIONS ON 46 OF THEM (40 PERCENT). WE ALSO EXAMINED 61 PROCUREMENT-RELATED PAPERWORK CASES AND RECOMMENDED CHANGES TO 27 OF THOSE (44 PERCENT).

OFPP HAS ALSO BEEN BUSY WITH MANY OTHER INITIATIVES--WORKING WITH OTHER GROUPS FROM BOTH THE GOVERNMENT AND THE PRIVATE SECTOR IN OUR EFFORTS TO STREAMLINE THE PROCUREMENT SYSTEM. SOME OF THESE INCLUDE:

- o BRIEFING THE PRESIDENTIAL TASK FORCE ON REGULATORY RELIEF ON THREE OCCASIONS, TO APPRISE IT OF OFPP PROGRAMS AND PRIORITIES;

- o BRIEFING THE PACKARD COMMISSION ON OFPP'S ACTIVITIES;

- o CONVENING THREE SESSIONS OF THE 24-MEMBER FEDERAL PROCUREMENT COUNCIL TO DISCUSS PROCUREMENT LEGISLATION AND OTHER PENDING ISSUES.

- o TESTIFYING ON OMB CIRCULAR A-76 BEFORE THE PRIVATIZATION COMMISSION;

- CONVENING A PUBLIC MEETING TO DISCUSS WAYS AND MEANS OF INCREASING THE NUMBER OF FEDERAL CONTRACTS AWARDED ON A COMPETITIVE BASIS;

- CO-CHAIRING WITH OMB'S FINANCIAL MANAGEMENT DIVISION (AND DoD) AN INTERAGENCY TASK GROUP ON CONTRACTOR/GRANTEE DEBARMENT AND SUSPENSION;

- CONDUCTING THE FIRST THOROUGH REVIEW OF THE FEDERAL PROCUREMENT DATA SYSTEM SINCE ITS CREATION IN 1979, AND DIRECTING A SERIES OF DATA AND FORMAT CHANGES; AND

- SUPERVISING AND MONITORING THE SUCCESSFUL TEST OF COMMERCIAL BANKCARDS BEING USED FOR GOVERNMENT SMALL PURCHASES.

ALTHOUGH WE'VE ACCOMPLISHED MUCH THIS PAST YEAR, MUCH MORE NEEDS TO BE DONE. IN ORDER TO MEET THE GOALS THAT WE HAVE ESTABLISHED FOR OURSELVES, WE ANTICIPATE ADDING AS MANY AS FIVE MORE PROFESSIONALS TO OUR CURRENT STAFF OF 27 TO MEET OUR CURRENT CEILING OF 32 FTE. NOT ONLY WILL THIS HELP IN THE AREA OF REGULATORY REVIEW, WHERE WE WILL HAVE THE MEANS TO BE THAT MUCH MORE RIGOROUS IN OUR EXAMINATIONS, BUT THE ADDITIONAL STAFF WILL ALSO ALLOW US TO COMPLETE SOME CURRENT PROJECTS AND TAKE ON SEVERAL MORE INITIATIVES.

CURRENTLY A FEW OF OUR MORE PRESSING PROJECTS CONCERN OUR

LEGISLATIVE PROPOSALS. WE ARE STILL AWAITING CONGRESSIONAL ACTION ON THREE INITIATIVES THAT WE HAVE SUBMITTED: OFPP'S REAUTHORIZATION, MULTI-YEAR PROCUREMENT AUTHORITY FOR CIVILIAN AGENCIES, AND OFPP'S AUTHORITY TO TEST INNOVATIVE PROCUREMENT METHODS. THERE ARE ALSO TWO OTHER BILLS THAT WE HOPE TO SUBMIT FOR CONGRESSIONAL CONSIDERATION VERY SOON. ONE OF THESE IS THE SINGLE, SIMPLIFIED PROCUREMENT STATUTE THAT THE PACKARD COMMISSION RECOMMENDED TO CONSOLIDATE THE SEVERAL BASIC STATUTES THAT CURRENTLY GOVERN THE PROCUREMENT PROCESS. THE OTHER WOULD ALLOW CONTRACTING OFFICERS TO USE ACCEPTED COMMERCIAL BUYING PROCEDURES TO PURCHASE COMMERCIAL-TYPE PRODUCTS AND SERVICES.

IN ADDITION TO THE ABOVE, MY PROPOSED AGENDA FOR THE FINAL YEAR OF THIS ADMINISTRATION INCLUDES:

- WORKING WITH THE FEDERAL ACQUISITION INSTITUTE, THE OFFICE OF PERSONNEL MANAGEMENT, AND THE CONGRESS TO ESTABLISH A GOVERNMENT-WIDE PROGRAM FOR IMPROVING THE QUALITY OF THE PROCUREMENT WORKFORCE;

- CONTINUING OUR REVIEW OF THE FEDERAL ACQUISITION REGULATIONS SO AS TO ENSURE THAT THOSE RULES PROPOSED ARE CONSISTENT WITH EXISTING PROCUREMENT POLICIES AND WITH LAW. TO THE EXTENT THAT WE ARE ABLE, I WOULD ALSO LIKE TO BEGIN A THOROUGH REVIEW OF THE FEDERAL ACQUISITION REGULATION AND THE AGENCIES' SUPPLEMENTAL REGULATIONS SO THAT WE MAY RESCIND THOSE REGULATIONS

WHICH ARE UNNECESSARY, DUPLICATIVE, OR OVERLY BURDENSOME; AND

- SEEING TO THE REAUTHORIZATION OF APPROPRIATIONS FOR THE OFFICE OF FEDERAL PROCUREMENT POLICY.

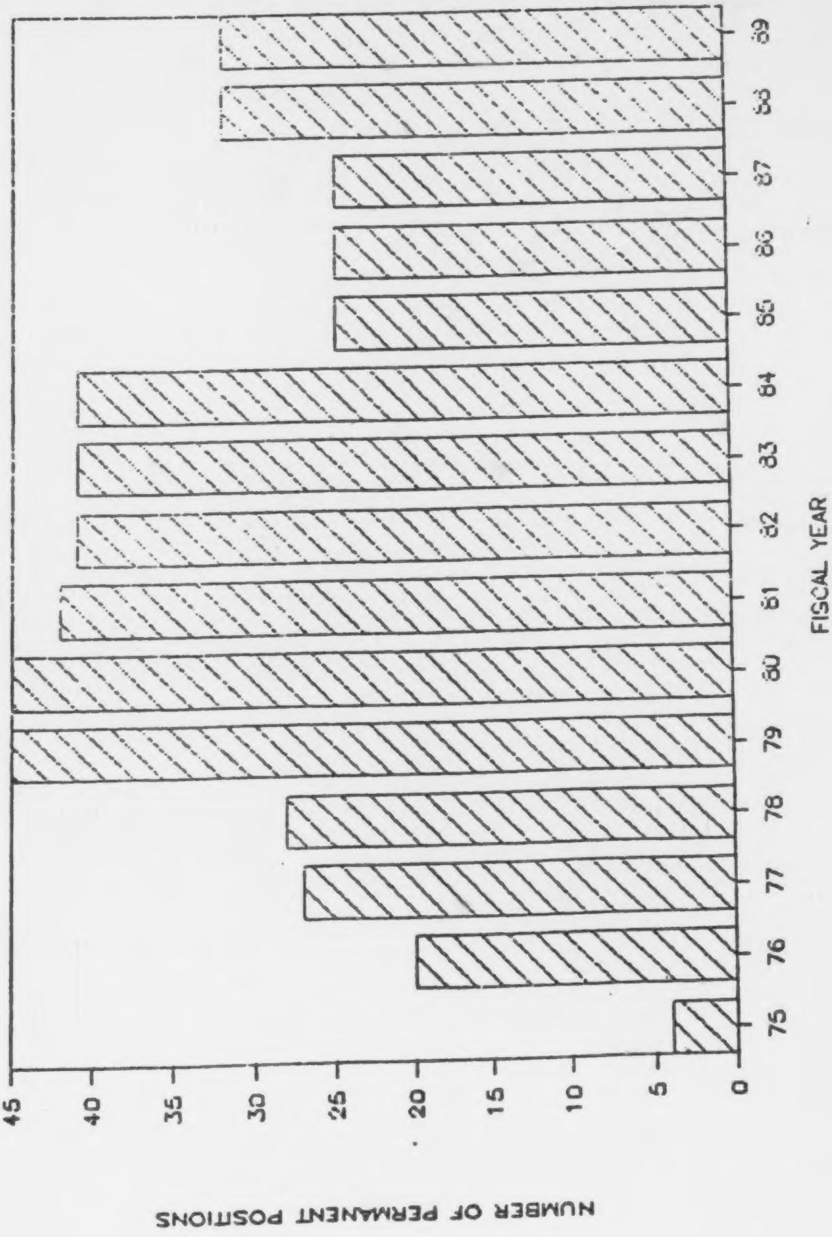
SUMMARY

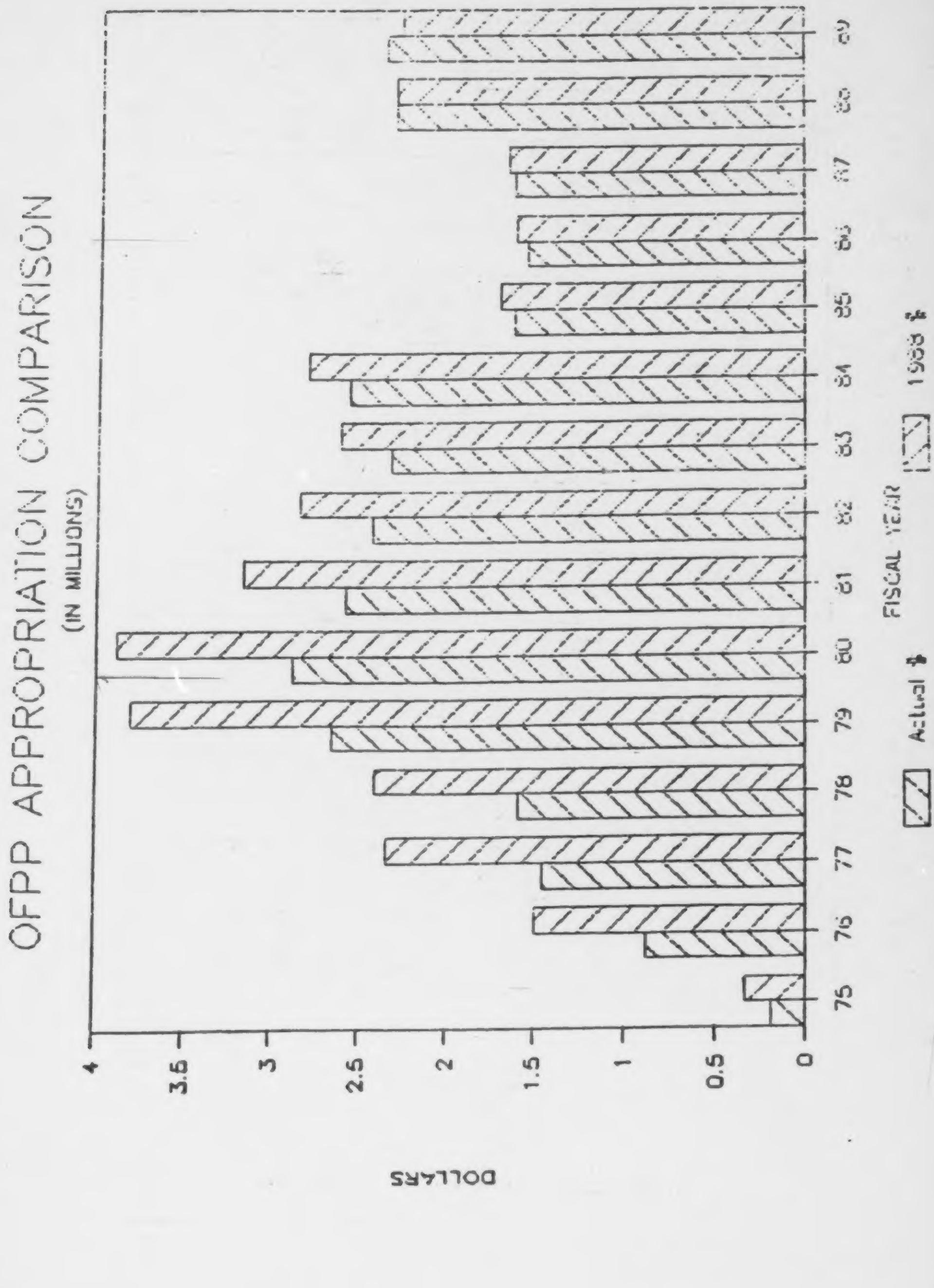
THE NEED FOR OFPP CONTINUES. THE PURPOSES FOR WHICH THE OFFICE WAS CREATED IN 1974 ARE CONTINUING RESPONSIBILITIES. OUR EFFORTS TO STREAMLINE THE ACQUISITION PROCESS -- WHICH IS RESPONSIBLE FOR THE EXPENDITURE OF OVER $200 BILLION ANNUALLY-- HAVE MET WITH MUCH SUCCESS IN THE PAST, BUT THERE IS MUCH MORE TO DO.

THE PROJECTS THAT WE BEGAN IN 1987 AND THOSE THAT WE PLAN TO INITIATE IN 1988 SHOULD NOT ONLY SAVE THE GOVERNMENT WORKFORCE MILLIONS OF MAN HOURS, BUT SHOULD ALSO SAVE THE GOVERNMENT CONTRACTOR A PROPORTIONATE AMOUNT OF TIME AND EFFORT AS WELL. THIS WILL MAKE IT CHEAPER FOR THE PRIVATE SECTOR TO DO BUSINESS WITH THE GOVERNMENT, AND INCREASE THE RATE OF COMPETITION FOR FEDERAL CONTRACTS.

I WOULD BE PLEASED, MR. CHAIRMAN, TO RESPOND TO QUESTIONS YOU OR THE OTHER MEMBERS OF THE SUBCOMMITTEE MAY HAVE.

OFPP AUTHORIZED STAFFING, FY '75–'89




OFPP APPROPRIATION COMPARISON
(IN MILLIONS)
DOLLARS
4
3.5
3
2.5
2
1.5
1
0.5
0
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
FISCAL YEAR
Actual $
1988 $

APPENDIX C (Con't)

EXECUTIVE OFFICE OF THE PRESIDENT

OFFICE OF MANAGEMENT AND BUDGET
OFFICE OF FEDERAL PROCUREMENT POLICY

Justification of Estimates
for the 1989
Appropriations Request

PREPARED FOR THE COMMITTEE ON APPROPRIATIONS

ATTACHMENT---3

APPROPRIATIONS LANGUAGE

1989 Regular Appropriations

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
OFFICE OF FEDERAL PROCUREMENT POLICY

SALARIES AND EXPENSES

For expenses necessary for the Office of Federal Procurement Policy including services as authorized by 5 U.S.C. 3109, $2,353,000.

OFFICE OF FEDERAL PROCUREMENT POLICY

Mission Statement

The Office of Federal Procurement Policy, established in 1974, is responsible for promoting economy, efficiency, and effectiveness in the procurement of property and services by and for the Executive Branch.

SUMMARY TABLES

Budget Overview
(in thousands of dollars)

	Actual 1987	Estimated 1988	Requested 1989
Budget Authority	1,620	2,300	2,353
Obligations	1,588	2,300	2,353
Outlays	1,626	2,230	2,348

Personnel Overview

	1987	1988	1989
Full-time Equivalent Positions	21	32	32

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
OFFICE OF FEDERAL PROCUREMENT POLICY

SALARIES AND EXPENSES

Programing and Financing (in thousands of dollars)

	Actual 1987	Estimated 1988	Requested 1989
Program by activities:			
Procurement Policy	1,588	2,300	2,353
Financing:			
Unobligated balance lapsing	32	---	---
Budget Authority	1,620	2,300	2,353
Relation of obligations to outlays			
Obligations incurred, net	1,588	2,300	2,353
Obligated balance, start of year	319	287	357
Obligated balance, end of year	-287	-357	-362
Adjustments in expired accounts	6	---	- - -
Outlays	1,626	2,230	2,348

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
OFFICE OF FEDERAL PROCUREMENT POLICY

SALARIES AND EXPENSES (Continued)

Object Classification (in thousands of dollars)

	FY '87 Actual	FY '88 Estimate	FY '89 Request
Personnel compensation:			
Full-time	862	1,555	1,590
Other than full-time permanent	44	--	--
Other personnel compensation	--	20	20
Special personnel compensation	15	25	25
Total personnel compensation:	921	1,600	1,635
Personnel benefits	92	192	196
Travel and transportation of persons	15	30	31
Rental Payments to GSA	213	225	232
Communications, Utilities and Miscellaneous Charges	48	75	77
Printing and Reproduction	2	25	25
Other Services	74	94	97
Supplies and materials	39	30	30
Equipment	184	29	30
Total Obligations:	1,588	2,300	2,353

COST JUSTIFICATION BY OBJECT CLASS

Personnel Compensation (Object Classification 11), $1,635,000

This 1989 request represent an increase of $35,000 over the 1988 estimate. It will permit the Office to maintain its current authorized strength of 32 FTEs. The staffing request is still substantially less than it was at the beginning of this Administration, as indicated below.

1980	1981	1982	1983	1984	1985	1986	1987
45	42	41	41	41	25	25	25

When fully staffed, OFPP will be in position to fulfil its responsibilities in the procurement regulatory area--including the review of agency draft supplementary regulations. It will also permit greater involvement in the development and review of procurement legislation and related Administration initiatives.

Personnel Benefits (Object Classification 12.1), $196,000

This request is for OFPP's mandatory contributions to the Civil Service Retirement System, the Social Security Retirement and Medicare programs, the Federal Employee Life Insurance Program and the Federal Employees Health Program. It includes $49,000 to meet the FERS requirements.

Travel and Transportation of Persons (Object Classification 21), $31,000

This request, reflecting an increase of $1,000 over FY '88, will permit the Office to promote the Administration's procurement initiatives throughout the procurement community -- and to maintain the national visibility OFPP enjoys as the principle procurement policy organization of the Executive Branch.

Rental Payments to GSA (Object Classification 23.1), $232,000

The rental rates for both Old and New Executive Office Buildings will increase slightly in FY '89. This request reflects those increases as well as an increase in NEOB office space to accommodate additional staff members. Of the $232,000 request, $22,000 is for usage charges and the remainder is for rent.

Communications, Utilities and Other Rents (Object Classification 23.3), $77,000

This request includes payments of OFPP's pro rata share of the Executive Office of the President telephone switchboard, telephone service, after hour utilities and postage. The requested amount is approximately the same as FY '88, adjusted for inflation.

Printing and Reproduction (Object Classification 24), $25,000

This request covers the cost of publishing in the Federal Register; work done by the Government Printing Office (GPO) and other reproduction work which cannot be handled by the Office of Administration's printing facility. It is the same as the FY '88 estimate.

Other Services (Object Classification 25), $97,000

This request includes charges for computer time sharing, personnel security investigations, training and other related services. The request is approximately the same as FY '88, adjusted for inflation.

Supplies and Materials (Object Classification 26), $30,000

This estimate is for the purchase of normal office supplies, periodical subscriptions, and additional work materials. It reflects the cost of supplies and materials associated with bringing several new staff members on board.

Equipment (Object Classification 31), $30,000

This request covers purchase of word processing and related equipment for new and current employees, and to permit greater integration of OFPP into the OMB information processing system.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
OFFICE OF FEDERAL PROCUREMENT POLICY

Summary of Increases and Decreases from 1988 to 1989 (In thousands of dollars by object classification)

Fiscal Year 1988 Estimate		2,300
Increases:		
Personnel Compensation	+ 35	
Personnel Benefits	+ 4	
Travel	+ 1	
Rental Payments to GSA	+ 7	
Communications Utilities and Misc.	+ 2	
Other Services	+ 3	
Equipment	+ 1	
		+ 53
Fiscal Year 1988 Request		2,353

APPENDIX C (Con't)

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
OFFICE OF FEDERAL PROCUREMENT POLICY

Personnel Summary

	FY '87 Actual	FY '88 Estimate	FY '89 Request
Total number of full-time			
permanent positions	25	32	32
Total compensable workyears			
full-time equivalent	21	32	32
full-time equivalent of overtime and holiday hours	0	0	0
Average ES salary	$71,950	$72,675	$72,675
Average GS grade	12.3	12.5	13.4
Average GS salary	$39,803	$45,647	$50,515

NOTE: No funds were utilized for consultants in FY '87 nor are any expected to be used for this purpose in FY '88 or FY '89.

Statement of Hugh E. Witt
Before the
Subcommittee on Federal Spending, Budget
and Accounting
Committee on Governmental Affairs
U.S. Senate

March 25, 1988

Mr. Chairman, and members of the Subcommittee, my name is Hugh E. Witt. I was the first Administrator of the Office of Federal Procurement Policy, and I am pleased to be here today to testify concerning reauthorization of that office.

Your letter of March 16 listed five issues of interest to the Subcommittee. I will comment on them as you requested.

(1) The role and duties of a Federal Regulatory Council:

In my opinion, the FAR Council should consist of the Administrator of the OFPP, as Chairman, and acquisition policy officials from DOD, GSA and NASA. I would envision each agency having key staff members performing the day-to-day functions of issuing and maintaining the FAR. The top agency officials would become involved when important issues could not be settled by their representatives. The Administrator would have the authority to settle disputes and would, in effect, have the final word.

This arrangement would parallel what is actually taking place today. The Administrator has the authority, and is exercising it, to question FAR decisions.

(2) The scope of authority vested in the Administrator of OFPP to initiate procurement regulations and policies:

After observing the operation of the OFPP for some 13 years now, I am convinced the law should make clear that the Administrator has regulatory authority. I am not alarmed that anyone holding that post would issue regulations which would endanger the defense of the nation. The agencies and departments are quite capable of making their views known on key issues which affect them. They have strong friends in the Congress who would not let the Administrator run rampant. Our democratic system of government has many checks and balances to protect itself from radical decisions.

(3) An assessment of the OFPP's effectiveness in the immediate past, suggestions for improvement, and whether the Office should be reauthorized.

First, the OFPP should be reauthorized.
Second, it should be given permanent authorization. This would assist the Administrator in obtaining and keeping good staff. It would eliminate the managerial turmoil involved in the reauthorization process. The OFPP has sufficient visibility, and the Administrator is called up for enough Congressional hearings, so that additional periodic viewing is unnecessary.

As to the office's effectiveness in the immediate past, I would say the present Administrator has shown a credible amount of constructive activity and yet has approached the use of his authority with reason. It is obvious to me that he understands the political nuances of the game. That can be extremely important in the Washington environment.

One very vital fact to be emphasized is that the Administrator has support from the Director of the Office of Management and Budget, and from the President.

I also recommend that additional experienced senior procurement personnel be placed on the OFPP staff, and that the Administrator position be upgraded to an Executive Level III.

(4) The utility of re-establishing the Cost Accounting Standards Board in the OFPP:

There is general agreement in government and industry that a CAS Board be established. I agree, and am convinced the OFPP is the only logical location. However, such a function would need technically qualified staff, and the procurement and accounting communities must be adequately represented. I would also recommend that all standards be examined on a cost/benefit basis before issuance.

(5) The utility of profit methodology study:

During testimony last June before the House Committee on Government Operations, I congratulated the Administrator of OFPP for taking the lead in working on the methodology problem with the DOD and the General Accounting Office. I understand a number of meetings have been held and more are scheduled. It is important that the confidentiality of contractors' proprietary data be given consideration during these deliberations.

Having worked in the DOD, OMB, and most recently in industry, I am convinced that profit policy itself must remain with each government agency. The individual agencies have their own assigned missions to perform. They must have the freedom to fashion their profit policies in a manner to best assist them in the performance of those missions.

The entire business of profit methodology, reporting, and analysis is extremely sensitive and should be approached carefully. The recent study by the MAC Group of Harvard University shows in stark fashion the impact a number of government laws and regulations will have on defense contractor profits unless corrective action is taken. We may well be discussing a few profit policy trees while the forest is in danger of burning down.

That concludes my prepared remarks, Mr. Chairman.

TESTIMONY OF

LESTER A. FETTIG

Former Administrator
Office of Federal Procurement Policy

before the

SENATE SUBCOMMITTEE ON FEDERAL SPENDING, BUDGET & ACCOUNTING

Committee on Governmental Affairs

Mr. Chairman and Members of the Committee:

It is a very personal pleasure to come before you again. Sixteen years ago, I had the privilege to begin serving as your Staff Director for this Subcommittee's progenitor "Ad Hoc Subcommittee on Federal Procurement".

We initiated a broad series of procurement reform initiatives at Chairman Chiles' direction -- including our first effort to create, in the first place, an "Office of Federal Procurement Policy." Having earlier served on the staff of the congressional Commission on Government Procurement, of which Senator Chiles was a member, Senator Sam Ervin charged us broadly with the Commission's reform agenda.

Having enjoyed that long term privilege to serve, including later as Administrator for Federal Procurement Policy, please permit me some opening perspectives. This may the last time in eighteen years that I've had the honor to sit with you on both sides of the witness table.

SENATOR CHILES' LEGACY

This will be the last session of Congress when the whole Federal contracting community will have Lawton Chiles to depend on to initiate, defend, weigh in and otherwise anchor sensible progress in the vital arena of Federal acquisition.

We all owe him the deepest debt of gratitude and respect for his role as Chairman of the Society of Honorary Sisyphi, as we've come to joke -- those Members who, like Senators Danforth and Cohen, Nunn and Roth, Glenn and Levin -- have persistently bent their shoulders to the rock of government management reform and rolled it uphill.

In this election year, Senator Chiles' record has special significance. For all we hear about the need to raise taxes and cut spending -- for all the heat a motion spent on these gross inputs and outputs to our Government -- who is talking about what's in the middle beyond glib slogans and populist generalities? Who's really grappling with the management process by which Government takes these taxes and what value we get when we spend it??

Well, Lawton Chiles has for nearly twenty years. Of course, we're talking in large part about the Federal contracting and grants process where Senator Chiles has spent so many years rolling the rock to get better value for the dollar. In contracts alone, we're talking about $200 billion annually, over 22 million separate contract actions trying to take those revenues actually service public needs. How we do it -- and how well we do it -- goes straight to the heart of whether this

Government is working -- or broke and in bad need of fixing.

Senator Chiles, down to the lick log, you've been our "Mr. Goodwrench" to make it Government deliver more miles per gallon of Federal tax dollars.

Let me add a note of compliment which the Washington community may appreciate even better than the folks in Florida. You've done it with statesmanship and lasting impact. You've resisted the temptation to simply spend your years running Government by press release, with quick hits and horror stories good for the headlines but with no lasting substance of improvement.

And there should be no mistake that your eighteen years of effort has left a substantial and proud record, quantified and verified in dozens of GAO reports and statistics as a result of your initiatives in Federal procurement and carry-over regulatory efforts. The system is still in need of substantial fixing, but:

- For every dollar overspent for a hammer, you've saved millions in pushing for commercial specifications on everything from T-shirts to hamburgers.
- For every illegitimate sole-source award, you've saved us billions from expanded competition finally codified in CICA, the origins of which are in your Senate bills.
- For every Federal or contract employee randomly out of work from whimsical contracting in or out decisions, you've made thousands of workers more secure and more productive and saved billions from the disciplined cost comparison process -- while protecting worker security.
- For every weapon system made obsolete by pre-ordained old technology, too late to help the troops, there's at least one other case where mission-based requirements have let American technology come better to the fore.

For all your scraped knuckles, caked on grease and sore shoulders -- we say thanks. Your legacy is a proud one, a pride we share in having had the chance to support you over the years.

If any further evidence of appreciation is needed, here you are today again -- Chairman of the Senate Budget Committee, as if you didn't have a few other things to tend to -- rolling the rock uphill one more time when most of the town has already gone into lame duck mode.

So let me address myself to the reauthorization of OFPP and some of the issues the Committee requested we examine.

BACKGROUND PERSPECTIVES ON OFPP

The Second law of Thermodynamics tells us we're fighting an uphill battle against chaos -- everything tends to disorder and entropy's going to get you on average -- unless someone exerts enormous energy to create local pockets of order.

Now -- let's look at Washington and the Federal Government.....Need we say more about a weaker or stronger OFPP? Take a look around at the constant chore of maintaining order in a Government management arena which impinges on --

-- trade policy, profit levels, our industrial base, small and minority business, competition, cost accounting standards, national defense, new technology evolution, audit standards, waste, fraud and abuse, construction and service contract wage rates, Federal employee versus contractor performance, paperclips to spaceships....

Consider the sycophants and the supplicants spinning around in overlapping orbits every day --

-- the lawyers and accountants, the industries and the agencies, the congressional committees, the Executive office staffs, the OMB budget divisions, the Federal employee unions....

It's a miracle you've created any sense of order whatsoever in these last sixteen years. But the more that OFPP authorities are weakened, the more people think order happens by itself from inter-agency committees and delegated Dudley-Do-Right dictums, the sooner you'll find the next Administrator floating off somewhere in the Crab Nebulae.

The rules are simple enough:

(1) Create strong, clear authority, responsibility and accountability to the Congress and the President;

(2) Provide check and balance mechanisms for review and reconciliation to both illuminate and protect legitimate special needs....

...but for heavens' sake, give future Administrators both the directive authority and the obligation to get on with business and manage the entropy in Federal contracting. It is in the interest of an effective Executive -- it is in the interest of an effective Legislature -- it is in the interest of the taxpayer -- to create and maintain a brain for the beast.

So it's not surprising that the GAO survey found 94 percent of industry respondents -- and 75% of Government acquisition officials -- all supported the need for and reauthorization of OFPP.

Notably, however, one-third of those people felt OFPP had been generally or very ineffective in recent years.

Against that backdrop, and with the benefit of a few scraped knuckles of my own over the years, let me summarize my views on some of the outstanding issues in the draft OFPP legislation.

OFPP AUTHORITY

It will come as no surprise to you that I favor full restoration of the original directive authorities which I enjoyed as Administrator.

It can be argued with some validity that the removal of those authorities in 1979 and only partial restoration in 1983, correlate with the relative decline in effectiveness noted by observers in the GAO report.

Here, I believe the House bill being considered by Chairman Brooks is preferable to the Senate draft under consideration.

Case Example: In just one of many fondly recalled cases I wish to forget, the Secretary of Defense appealed to the President to please urgently add $300 million for Air Force engine overhaul. It seemed that the Secretary of Labor had unilaterally decided to newly assert Service Contract Act wage rate coverage -- and up went all the contract costs.

(On the same issue, a small business in South Carolina was suffering open labor warfare because the wage rates newly imposed under Government contracts for GI K-ration kits had to be markedly different from those same packages being put together for campers -- all on one assembly line!)

I felt I would be held accountable and violate OFPP's clear authority and regulatory charter not to rule on the matter when asked -- and so contradicted the independent assertion of the Labor Department after careful assessment. The matter was successfully resolved between myself, the Secretary of Labor and Defense and OMB Director consistently and in a balanced fashion while, again, congressional voices also expressed some rather pointed "hands off" admonitions from Congressman Frank Thompson, who also retired thereafter but to different Federal facilities.

I think that case also exemplifies that even a strongly empowered OFPP Administrator cannot ever run rough-shod over any executive department in any event -- and that the strong regulatory authority is in the interest of each and every department, including and especially the DoD, when cases such as this arise. The checks and balances on even strong OFPP authority are automatic and severe for any issues of importance anyway, with the Office placed in unholy juxtaposition between the White House, OMB and congressional committees.

Likewise, I strongly endorse the proposed language for the Administrator to clearly and distinctly take initiatives he or she feels are needed.

Case Examples: There was no bill pending, no irate lobbying group, no pressure at all to create a centralized and standard Government contracts data base. We did that because the need was there and the Federal Procurement Data System, I believe, is serving a vital needs for all members of the community.

Even the American Federation of Government Employees issued a press release lauding the FPDS initiative -- and supported the far more substantive reforms we issued under our own volition to bring order to the chaotic contracting-out arena where workers, public and private alike, were being whipsawed in their most precious job security.

FAR COUNCIL

When I initiated the creation of the FAR system, the consensus was that it couldn't be done and wouldn't be done--but that it probably should be done given the 838 some-odd sets of independent regulatory bodies floating around in the Government nebulae.

It would not have been done at all if I did not have the directive authority then in my statute.

With enormously good support and cooperation from DoD and the other agencies, the FAR was created, published and, somewhat later than necessary, put into effect. The FAR Council, as I conceived it at the time, required only my then-strong regulatory authority to put in place and to ride herd on the system with a disciplined process.

Since -- and even before -- issuance, entropy has had the upper hand in the FAR system with redundant sets of agency regulations spinning off and even new clauses being invented in RFP's while agencies continue to grapple unevenly and separately with vital issues such as uncompensated overtime and compliance with new 5% targets for small and minority business.

With that in mind, I would urge the Committee to --

o By all means codify the FAR Council and FAR system, as has been done.

o Make no dilution in the clear authority and responsibility of the Administrator to control the regulatory system, provided the agencies and other affected parties have due process and means to present and protect their unique needs.

Here, the debate between House and Senate seems to me to boil down to where the onus lies to permit, start or stop an issuance. If the agencies appear to be authorized to go ahead and issue separate regulations subject to their own needs and good conscience that their cause is just -- and then the Administrator and FAR Council are left to catch up, you have a losing battle.

Case Example: I remember, during the time we were just creating the FAR, the Congress passed the Small Business Act Amendments of 1978, including substantial overhauls in the small and minority business programs.

I felt the obligation under my authorizing statute to bring full force and prompt effectiveness to congressional intent through regulatory issuance which, as I recall, was only 90 days.

Well, the SBA screamed (and certain congressional committees screamed) that OFPP should keep their hands off that one and let SBA write and issue the regulations independently. Since the White House seemed to agree, no small consideration, I should say, we were content to sit back to see what would happen.

The drafts got all wrapped around the axle; feudal warfare broke out among the agencies; coordination collapsed -- and the congressionally-mandated deadlines just slipped on by, violating provisions of public law.

The advocates for independent SBA regulatory action changed their minds.

OFPP then weighed in, coordinated and had the regulations out and on the street in 30 days. I could not have done that if either (1) my regulatory authority was not clear or (2) I was bound up in a FAR Council which made me play catch up later to

SBA good intentions that their regulations were clearly unique.

I believe the system worked and in the end, it was congressional will which was otherwise being frustrated, a public purpose left hanging and all executive agencies relieved that balanced implementation had been achieved.

And here again, the inherent restraints in OFPP's exercise of even directive authority should be apparent.

COST ACCOUNTING STANDARDS BOARD

My views on the proposal to re-create the CASB under OFPP are fairly simple. If a CASB is to be reconstituted, it most certainly should be configured with OFPP, as proposed, rather than as an independent agency -- if, for no other reason, that there is now already overlap and duplication between the FAR Part XV Cost Principles coverage and the Administrator's chore to maintain such policies consistently Government-wide.

These obviously must be maintained consistently -- and I question whether the FAR itself is not the more important objective vehicle for the consideration and maintenance of cost accounting standards for Government contractors.

CONCLUSION

Mr. Chairman, this hearing should prompt you to look back with satisfaction on all you've accomplished -- and also with a sense of well-deserved relief that now it must pass to others to keep rolling that stone. The uphill path you've cut in eighteen years will be hard to duplicate by anyone who follows -- and we thank you sincerely.

Testimony of
Karen Hastie Williams

OFPP REAUTHORIZATION

Mr. Chairman and Members of the Subcommittee:

My name is Karen Hastie Williams. I am a partner in the Washington law firm of Crowell & Moring and a former Administrator of the Office of Federal Procurement Policy. I appreciate the opportunity to appear before the Committee today on this distinguished panel of former Administrators to discuss the proposed reauthorization of OFPP.

If you would permit me a point of personal privilege, I would like to take this opportunity to express my personal thanks to Senator Chiles for his consistent leadership and support for OFPP and for sound, sensible procurement practices during his years in the Congress. History will certainly record the public role of Lawton Chiles in authoring S.5 and other early legislative initiatives that led to the creation of OFPP. History will also attest to his leadership in the establishment of the Federal Acquisition Regulation and the elimination of fraudulent practices throughout the procurement world.

But, the public may not be aware of the additional contributions that Lawton Chiles has made to a better procurement environment. The record should include the many long, thankless hours spent at hearings on competition, payment practices and other procurement procedures within federal agencies. His responsiveness was significant when procurement irregularities were identified by contractors, trade associations, government representatives, and other interested parties. In his travels to Florida and throughout the country, Senator Chiles always made time to listen to procurement issues raised by concerned citizens. These matters did not win headlines or acclaim from the general public, but they have not gone unnoticed by the procurement community. His concern and commitment to the integrity of the procurement process are extraordinary examples of the best kind of public servant that this country can produce. We salute you, Mr. Chairman, and will miss your extraordinary leadership.

Turning now to the reauthorization of OFPP, I want to add my strong support in favor of reauthorization. Now, more than ever, procurement issues are increasingly more diverse and more complex. There is a crying need for a strong central agency to coordinate and take a leadership role in the procurement process. In the wake of diverging views on issues ranging from data rights, to progress payments, to small business programs, a stable voice of reason is required.

Reauthorization of OFPP will provide much-needed leadership by centralizing responsibility for procurement-related decisions in a body independent of the various contracting agencies. Since OFPP was last reauthorized in 1983, the need for centralized executive branch responsibility and leadership for developing procurement policies, reviewing regulations and monitoring ongoing procurement operations has become even more critical.

In the interest of time, I will briefly address the issues raised in proposed Senate legislation and its House counterpart.

OFPP Reauthorization for a Four-year Period.

The Senate and House bills propose that OFPP be reauthorized for four years. In my view, OFPP should be reauthorized for at least a four-year period and perhaps on a permanent basis. It has now been almost 15 years since OFPP was first established. I believe that it has proved its institutional viability and has earned the right to permanent reauthorization.

The elimination of the need to go through the hurdles of periodic reauthorization will permit the Administrator to take on many procurement issues which require the development of a solution over a long period of time. The agencies are not going to change their practices overnight. Knowing that the office is a permanent part of the federal government will strengthen the ability of the OFPP Administrator to obtain greater cooperation from the agencies.

OFPP Regulatory Authority

The Senate bill gives the Administrator authority to initiate as well as respond to regulations. The House bill restores the original 1974 regulatory authority to the Administrator of OFPP. It reverses the current roles of the Administrator and the Director of OMB and returns them to the pre-1983 relationship. In my view, it is important to return the Administrator to the pre-1983 role and restore to OFPP its full regulatory authority as originally provided in the 1974 authorization. It is important to remember that the very nature and purpose of OFPP require that it have directive authority with respect to procurement policies, regulations, procedures and forms used by Government contracting agencies. This certainly does not mean that every agency and every contract must conform to a uniform requirement. OFPP must be sensitive to and must prescribe policies and requirements in the manner that accommodates legitimate differences in the types of products and services required or available to meet a particular agency's needs.

In addition, governing regulations must be fair to all and as simple and uniform as possible in order to increase competition. Voluminous, conflicting, unnecessary and sometimes ambiguous procurement regulations discourage competition, foster contract disputes and increase costs.

The proliferation of unnecessary or duplicative procurement regulations in the various agency FAR supplements has been a disturbing trend. The issue has at least three parts: (1) the duplication of FAR substantive rules and second-tier supplements; (2) the promulgation of rules in one or more agency supplements that should be, but for some reason are not, published on a government-wide basis in the FAR; and (3) the sheer proliferation of sub-tier supplements (especially in the Department of Defense) down to unpublished "regulations", three or four levels under the FAR!

An example of the second type of problem is the Veterans' Administration regulation published at 53 Fed. Reg. 7755 (Attachment 1). On January 5, 1987, the VA published a VA acquisition regulation interim final rule to supplement FAR coverage on the use of "brand-name or equal" purchase descriptions and other restrictive specifications. OFPP apparently commented back to the VA that the change was relevant to all federal agencies and recommended that the VA pursue a FAR revision. The VA was then advised by the Civilian Agency Acquisition Council to go ahead with the VA final rule while FAR coverage was considered. In the meantime, of course, a subject is covered only in a FAR supplement that should be covered (if at all) in the FAR itself.

Another example may be the attached GSA temporary rule implementing and supplementing FAR requirements on the ratification of unauthorized commitments (Attachment 2). It appears that other FAR supplements (such as the DFARs) also contain guidance for certain agencies on this issue. There is no obvious reason why the federal agencies should apply different rules about ratification of unauthorized commitments. One would think that this issue should be treated uniformly and exclusively in the FAR.

For the above-stated reasons, it is clear that policies, regulations and procedures should be scrutinized and controlled by a body such as OFPP that is independent of the agencies who actually enter into contracts.

Establishment of a Single Federal Acquisition Regulatory Council and its Relationship to Existing Councils

The Senate bill establishes a Single FAR Council. Section 4 of the House bill also establishes a single Federal Acquisition Regulatory Council. While the relationship between this "single council" and the two existing acquisition regulatory bodies (the Defense Acquisition Council and the Civilian Agency Acquisition Council) is not spelled out in the House bill, the Senate version clearly intends that the FAR Council supercede the existing Councils.

In the Senate proposal, the single council would supplant the existing regulatory bodies. In so doing, however, it would leave uncertain the legal status of their prior respective independent regulatory authority. It is clear that the Senate's single council would provide a mechanism for the Administrator and the Council to exercise regulatory authority for non-conforming regulations and would also provide absolute authority for the OFPP Administrator and the Council to overrule regulations issued by individual federal agencies.

The House language might be interpreted to project the single council into a "coordinating role". Such a role would arguably not displace the regulatory responsibilities of the two existing councils. Rather, under this interpretation, the single council could become a forum for discussion and coordination among the representatives of DOD, GSA, NASA and OFPP on the procurement matters for which government-wide coordination is essential. For example, in 1987, a coordination mechanism might have been useful on issues such as data rights, prompt payment exemptions, and contracting out. A coordinating forum in which each agency representative maintained equal authority could expedite the issuance of regulatory modifications, help avoid conflicting supplements and begin the process of reducing the high volume of procurement regulations.

It will be important for the Senate to clarify its legislative intent behind the single council and to establish a clear definition of: (1) the relationship of the single council to the existing regulatory councils; and (2) the relationships among the participants on the single council.

I fear that enactment of the House version, as is, without additional guidance, would lead to confusion, ambiguity and numerous legal and regulatory problems and would offset any positive contributions that might emerge from a single council.

Reestablishment of the Cost Accounting Standards Board

Section 4 of the Senate bill and Section 5 of the House bill establish within OFPP an independent board known as the Cost Accounting Standards Board ("CAS Board" or "Board"). Chaired by the Administrator, the Board includes members from the Federal Government, from private industry and from the accounting profession. While the number of representatives from each sector differs slightly in each version, the Congress intends for this Board to fill the void left by the expiration of the prior CAS Board authorization that existed between 1970 and 1980, albeit outside OFPP. The cost accounting standards adopted by the prior Board are still law today, but no organization retains jurisdiction to administer them.

I concur in the recommendations of the American Bar Association on the CAS Board and strongly support the legislative establishment of a new CAS Board with the following features:

- Locate CAS Board within the Executive Branch and, in particular, within OFPP. Placement of the Board within OFPP must be accompanied by increases in the staff of that office to ensure that this new responsibility can be met without an intolerable resource drain;
- Establish a reconstituted CAS Board with authority to promulgate new cost accounting standards, if necessary; to modify and grant exemptions and waivers from the previously established standards on cost allocability;
- Broaden scope of CAS Board authority to include responsibility for establishing standards and methods for determining cost allowability, but recognize policy authority of agency (at high Secretarial level) to establish which costs are allowable and to request CAS Board development of government-wide accounting standard to implement such policies;
- Recognize CAS Board authority to modify or change standards prospectively in response to other forces, e.g., decisions of Boards of Contract Appeals, courts, industry initiatives, contracting officers' analyses;
- Modify CAS Board authority to exclude from the cost accounting standards negotiated contracts that are priced on the basis of adequate price competition;
- Reconsider composition, qualifications and additional governmental representation among CAS Board representatives in light of Board's jurisdiction over implementation of both procurement policy and cost accounting issues; and
- Adopt procedures for notice and

> public comment in connection with the promulgation of rules, regulations, cost accounting standards, cost principles and modifications by the CAS Board. Although promulgations of CAS Board are proposed to be exempt from judicial review under APA, this legislation should make clear that administrative due process is required. Moreover, judicial review is provided for contract disputes arising out of the application of the cost accounting standards under the Contract Disputes Act.

Procurement Integrity

Since I am anxious to see the expedited reauthorization of OFPP, I applaud the Senate's decision to drop any reference to procurement fraud matters in this bill. The House bill contains Section 6, entitled "Procurement Integrity", that detracts from the core legislative purpose and, in my view, is likely to sidetrack its consideration by the full House. The Senate, in its wisdom, has appropriately left that issue to another day.

Small Business Competition Demonstration Program

In light of recent legislative discussion on increased procurement opportunities for small business and initiatives to establish the principle of fair proportion for small business participation by industry, the Committee may wish to consider adding another element to the reauthorization package. Utilizing the OFPP special testing authority for innovative procurement procedures, I believe that a pilot program could be established to demonstrate the positive impact of competition on the fair proportion principle for small business participation. In industries dominated by small businesses, size standard changes are not the only mechanism needed to establish small business participation at a fair proportion level.

If the objective of the small business program is to increase opportunities for small business contractors to participate in all facets of the procurement process, the Congress should have enough confidence in the competitive process to experiment with the goal of "total small business participation". By calculating the level of small business participation by reference to set-asides, open competition and subcontracts, the Congress will encourage the small business community to reach out for new opportunities. If successful, this pilot program will help to focus on the use of set-asides and other special techniques in industries where small business participation is traditionally low to attain a 30% participation level and allow open competition to set the level of participation in industries dominated by smaller businesses.

To establish a pilot competition program, several bold legislative steps would need to be taken.

- o Expand "small business participation" to include all awards to small businesses--through open competition, set-asides, subcontracting;
- o Measure awards using product and service codes;
- o Establish a 30% goal by industry for each reporting entity's small business participation program;

- Achieve goals through combination of open competition and specialized techniques, when needed;
- Suspend the "rule of two";
- 1-year backward snapshot of data;
- Use of prior year's data to measure actual participation levels. If open competition participation levels are low, then specialized techniques are used to meet the goal. Closer in time and efforts to performance.

Mr. Chairman, I would be happy to work with the Committee staff to amplify the pilot concept and to assist in the development of legislative language necessary to implement this demonstration program.

Conclusion

In conclusion, Mr. Chairman, let me again offer my personal thanks for your commitment to the integrity of the procurement process. I very much appreciate the opportunity to appear today and share with you my thoughts on the 1988 reauthorization of OFPP. I would be happy to respond to any questions that members of the subcommittee may have.

* * *

ATTACHMENT 1

The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transportation Service, (202) 857-3800, 2100 M Street, NW., Suite 140, Washington, DC. 20037.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

PARTS 73—[AMENDED]

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303.

§ 73.202 [Amended]

2. Section 73.202(b) the Table of FM Allotments, is amended under Tennessee, by adding Smyrna, Channel 231A.

Federal Communications Commission.

Bradley P. Holmes,

Chief, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 88-4816 Filed 3-9-88; 8:45 am]

BILLING CODE 6712-01-M

VETERANS ADMINISTRATION

48 CFR Parts 810, 836 and 852

Acquisition Regulations; Specifications

AGENCY: Veterans Administration.

ACTION: Final rule.

SUMMARY: The Veterans Administration (VA) is amending the VA Acquisition Regulations (VAAR) to provide agency guidance on the use of specifications, standards, and other purchase descriptions in the acquisition process. The regulation is being published as a final rule in order to supplement Federal Acquisition Regulations (FAR) 10.004(b)(2) and (3) to provide required detailed agency procedures, guidance and necessary clauses for VA contracting officers' use.

EFFECTIVE DATE: March 10, 1988.

FOR FURTHER INFORMATION CONTACT: Marsha J. Grogan, Policy and Interagency Service (91A), Office of Procurement and Supply, Veterans Administration, 810 Vermont Avenue NW., Washington, DC 20420, (202) 233-3784.

SUPPLEMENTARY INFORMATION: On January 5, 1987, there was published on page 280 of the **Federal Register** a notice of interim final rulemaking. After the interim rule was issued, five additional internal changes were made to provide guidance to contracting officers in the use of descriptive literature, bid samples, contract architect-engineer specifications, the brand name or equal clause, and the restriction on submission and use of equal products clause.

Section 810.004-70(b) was revised to require contracting officers, when issuing solicitations that include "brand name or equal" purchase descriptions, to include the FAR provision at 52.214-21, Descriptive Literature, and to review the requirements of FAR 14.202-5(d) when utilizing the descriptive literature provision.

Section 810.004-70(e) was revised to inform contracting officers, when requiring bid samples, to include the provision set forth at FAR 52.214-20, Bid Samples.

In § 836.202, paragraph (c) was renumbered and a new paragraph (b) was added to prohibit the use of "brand name or equal" or other restrictive specifications by contract architect-engineers without the prior written approval of the contracting officer during the design stage. Contracting officers were also notified to inform prospective architect-engineers of this requirement prior to award of a contract for design.

The prescription of the "Brand Name or Equal" clause found at 852.210-77 was revised to change an obsolete citation.

I. Background

When the FAR was issued, it contained a new Part 10 dedicated to the use of specifications. Part 10 does not, however, provide guidance in the use of "brand name or equal" purchase descriptions and other restrictive specfications. On January 5, 1987, the VA published a VAAR interim final rule to supplement the FAR coverage by providing guidance to VA contracting officers.

One comment was received from the Office of Federal Procurement Policy, Office of Management and Budget. They noted the published VAAR change, recognized the relevance to all Federal agencies, and recommended that VA pursue a FAR revision. VA was advised by the Civilian Agency Acquisition Council to publish a final rule while FAR coverage is being developed.

II. Executive Order 12291

Pursuant to the memorandum from the Director, Office of Management and Budget, to the Administrator, Office of Information and Regulatory Affairs, dated December 13, 1984, this final rule is exempt from section 3 and 4 of Executive Order 12291.

III. Regulatory Flexibility Act (RFA)

Because this final rule does not come within the term "rule" as defined in the RFA (5 U.S.C. 601(2)), it is not subject to the requirements of that Act. In any case, this change will not have a significant impact on a substantial number of small entities because the provisions implement the requirements of the Competition in Contracting Act (CICA) as required by the FAR. The provisions are primarily internal procedures which will not impact the private sector.

IV. Paperwork Reduction Act

This final rule requires no additional information collection or recordkeeping requirement upon the public.

List of Subjects in 48 CFR Parts 810, 836 and 852

Government procurement.

Approved: March 1, 1988.

Thomas K. Turnage,

Administrator.

In 48 CFR Chapter 8, Parts 810, 836 and 852 are amended as follows:

1. The authority citation for Parts 810, 836 and 852 continues to read as follows:

Authority: 38 U.S.C. 210 and 40 U.S.C. 486(c).

2. In section 810.004-70, paragraphs (b) and (e) are revised to read as follows:

810.004-70 Sealed bidding.

* * * * *

(b) Solicitations using "brand name or equal" purchase descriptions will contain the "brand name or equal" provision in 852.210-77, and the provision set forth at FAR 52.214-21, Descriptive Literature. Contracting officers are cautioned to review the requirements at FAR 14.202-5(d) when utilizing the descriptive literature provision.

* * * * *

(e) When a solicitation contains "brand name or equal" purchase descriptions, bidders who offer brand name products, including component parts, referenced in such descriptions shall not be required to furnish bid samples of the referenced brand name products. However, solicitations may require the submission of bid samples in

Prob. of agency supp. issues

the case of bidders offering "or equal" products. If bid samples are required, the solicitation shall include the provision set forth at FAR 52.214–20, Bid Samples. The bidder must still furnish all descriptive literature in accordance with and for the purpose set forth in the "Brand Name of Equal" clause, 852.210–77(c)(1) and (2), even though bid samples may not be required.

3. In section 836.202, paragraph (b) is redesignated paragraph (c), a new paragraph (b) is added, and the first sentence in newly redesignated paragraph (c) is revised, to read as follows:

836.202 Specifications.

* * * * *

(b) The use of "brand name or equal" or other restrictive specifications by contract architect-engineers is specifically prohibited without the prior written approval of the contracting officer shall inform prospective architect-engineers of this requirement during the negotiation phase, prior to award of a contract for design.

(c) If it is determined that only one product will meet the Government's minimum needs and the VA will not allow the submission of "equal" products, the bidders must be placed on notice that the "brand name or equal" provisions of the "Material and Workmanship" clause found at FAR 52.236.5 and any other provision which may authorize the submission of an "equal" product, will not apply.* * *

852.210–77 [Amended]

4. In 852.210–77, in the introductory paragraph, remove "810.005" and add, in its place, "810.004."

852.236–90 [Amended]

5.a. In 852.236–90, in the introductory paragraph remove "836.202(b)" and add, in its place, "836.202(c)".

b. In the clause in 852.236–90 titled Restriction on Submission and Use of Equal Products (November 1986), an introductory paragraph is added immediately below the heading to the clause to read as follows:

852.236–90 Restriction on submission and use of equal products.

* * * * *

This clause applies to the following items:

____

____

____

* * * * *

[FR Doc. 88–5275 Filed 3–9–88; 8:45 am]

BILLING CODE 8320-01-M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 611, 672, and 675

[Docket No. 71267–8024]

Foreign Fishing; Groundfish of the Gulf of Alaska; Groundfish of the Bering Sea and Aleutian Islands Area

AGENCY: National Marine Fisheries Service (NMFS), NOAA, Commerce.

ACTION: Final rule.

SUMMARY: NOAA issues a final rule to implement Amendments 16 and 11a to the Fishery Management Plans for Groundfish of the Gulf of Alaska and the Groundfish Fishery of the Bering Sea and Aleutian Islands Area (FMPs), respectively. These amendments accomplish the following: (1) Catcher/processor and mothership processor vessels operating in the Gulf of Alaska and Bering Sea and Aleutian Islands area are required to maintain onboard a transfer log and to report information weekly about transfers of groundfish products; (2) prohibited species in the Gulf of Alaska domestic and foreign fisheries are redefined, and three other categories of species are respecified; (3) the reserve category for some species of groundfish in the Gulf of Alaska is removed; (4) the term "target quotas" is changed to "total allowable catches" for groundfish in the Gulf of Alaska; (5) the starting date for the public comment period for proposed annual specifications is changed; (6) the Gulf of Alaska groundfish FMP is reorganized and edited; and (7) a section on vessel safety is added to the Gulf of Alaska FMP.

Items 1 through 5, above, are implemented by regulations, which are contained in the attached final rulemaking. Items 6 and 7, above, are not implemented by regulations. An additional regulatory change, not part of the amendment, expressly authorizes inseason reapportionments of domestic annual processing (DAP) groundfish amounts to joint venture processing (JVP) in the Gulf of Alaska. These regulations are intended to promote full accounting of groundfish catches in both management areas and to make clear the species in the Gulf of Alaska that are considered to be prohibited species. The reasons for these changes are given in the preamble for the proposed rule. They are necessary to adjust to the changing nature of the Alaska groundfish fisheries that are being increasingly dominated by U.S. fishermen. This action provides conservation and management measures to further the goals and objectives of the FMPs.

EFFECTIVE DATE: April 7, 1988.

ADDRESS: Copies of the amendments, environmental assessment (EA), and the regulatory impact review/final regulatory flexibility analysis (RIR/FRFA) may be obtained by contracting the North Pacific Fishery Management Council, P.O. Box 103136, Anchorage, AK 99510, 907–271–2809.

FOR FURTHER INFORMATION CONTACT: Ronald J. Berg (Fishery Biologist, NMFS), 907–586–7230.

SUPPLEMENTARY INFORMATION: Domestic and foreign groundfish fisheries in the exclusive economic zones (EEZ) of the Gulf of Alaska and the Bering Sea and Aleutian Islands area are managed in accordance with the FMPs, which were developed by the North Pacific Fishery Management Council (Council) under authority of the Magnuson Fishery Conservation and Management Act (Magnuson Act) and implemented by regulations appearing at 50 CFR 611.92 and 611.93 and Parts 672 and 675.

The Council approved for submission to the Secretary of Commerce (Secretary) the parts of Amendment 16 to the FMP for Groundfish of the Gulf of Alaska that are listed in the above summary. The Council adopted the same changes to reporting requirements as Amendment 11a to the FMP for the Groundfish Fishery of the Bering Sea and Aleutian Islands Area.

The Secretary received these amendments on November 18, 1987, for review. The Magnuson Act requires the Secretary, or his designee, to approve, disapprove, or partially disapprove FMPs and FMP amendments before the close of the 95th day following receipt. Following receipt of Amendments 16 and 11a, the Director of NMFS, Alaska Region (Regional Director), immediately commenced a review of the amendments to determine whether they were consistent with the provisions of the Magnuson Act and any other applicable law. A Notice of Availability of the amendments was published in the Federal Register on November 25, 1987 (52 FR 45218). A proposed rule was filed with the Office of the Federal Register on December 18, 1987 and published on December 22, 1987 (52 FR 48353). The Notice of Availability invited review and comment on the amendments until January 19, 1988. The proposed rule invited public review and comment on the regulations until January 20, 1988. This final rule implementing Amendments 16 and 11a takes comments received into account.

In promulgating the Final Rule, the Commission consistently alluded to the detrimental effects of the waiver system implemented under Decree 009–86 as the basis for its original concern that conditions unfavorable to shipping might exist, as well as our determination that the "authorization" system which replaced the waiver system following conclusion of the MOU was not a material improvement in the inherently discriminatory system. If the discriminatory nature of the existing trade conditions remains in the absence of Decree 009–86, the Commission is prepared to act swiftly to reinstate the Final Rule on the basis of new findings that conditions unfavorable to shipping continue to exist because of continued exclusion of the Chilean or other third-flag carriers and compliance burdens placed on U.S. shippers and trade interests. Withdrawal of the Final Rule accompanied by termination of this proceeding, therefore, does not appear to be an appropriate Commission response in view of the totally unknown nature of the practical effects of the rescission of these enactments.

The Commission has determined not to grant Petitioners' request for a stay, but herein grants the request for reconsideration, withdrawing the Final Rule to await clarification of the GOP legal regime which will govern the Trade at present and the nature of the scheme which the GOP intends to put in place for the future. In order to accommodate further action on this matter, the proceeding will continue and to that end the Commission also requests further information from any interested party by March 31, 1988, including the Executive Agencies, carriers and shipper organizations who previously filed comments.

B. Santa Petition

No basis appears to exist for granting the Santa Petition on its merits. Although Santa may not have requested passage of the cargo preference decrees by the GOP, as it states, the preferences established by those decrees were intended to and did benefit *all* Peruvian-flag carriers directly by increasing their share of the market at the expense of their third-flag competitors. Neither Decree 009–86 nor Resolution 044–86 distinguished between state-owned and privately-owned carriers. Decree 009–86 imposed a waiver system on all non-Peruvian-flag carriers (except those which obtained "associate status" through agreements with Peruvian-flag carriers) without regard to the private or public nature of their owners. Similarly, Resolution 044–86 banned service by Chilean-flag carriers without regard to their ownership.

In its petition, Santa states that it previously had financial and management problems but began regular service in April 1986, under new management. Santa further states that its market share for the January 1986–July 1987 period was 25 percent. Santa's ability to garner such a large proportion of the Trade during this period suggests that its position was aided by the existence of the GOP decrees. In any event, Santa appears to have been a significant beneficiary of these decrees. The Santa Petition is, therefore, denied.

Therefore, pursuant to section 19(1)(b) of the Merchant Marine Act, 1920, 46 U.S.C. app. 876(1)(b), Reorganization Plan No. 7 of 1961, 75 Stat. 840, and 46 CFR Part 585, Part 586 of Title 46, Subchapter D of the Code of Federal Regulations, published at 52 FR 46362, December 7, 1987 is withdrawn for reconsideration. Interested parties are invited to submit comments, views and information on or before March 31, 1988, concerning whether the unfavorable conditions previously found in this proceeding continue to exist, whether other conditions unfavorable to shipping in the U.S. foreign trade with Peru now exist, and what action should be taken with respect to the Final Rule.

By the Commission.

Joseph C. Polking,
Secretary.

[FR Doc. 88–5009 Filed 3–7–88; 8:45 am]

BILLING CODE 6730-01-M

GENERAL SERVICES ADMINISTRATION

48 CFR Parts 501, 532, and 552

[Acquisition Circular AC-88-1]

Prompt Payment and Ratification of Unauthorized Commitments

AGENCY: Office of Acquisition Policy, GSA.

ACTION: Temporary rule.

SUMMARY: This Acquisition Circular temporarily amends Parts 501, 532 and 552 of the General Services Administration Acquisition Regulation (GSAR), Chapter 5, to implement and supplement the Federal Acquisition Regulation (FAR) requirements on the ratification of unauthorized commitments; to add material to prescribe constructive acceptance or approval periods for recurring building services, supplies and other nonpersonal services, construction, architect-engineer and other professional services; to add and prescribe a Payments by Electronic Funds Transfer clause for use in solicitations and contracts when payments may be made by GSA and other agencies; to add and prescribe a Prompt Payment clause for acquisitions of leasehold interests in real property; and to make other miscellaneous changes for clarity. The intended effect is to implement FAR (FAC–84–33) and to provide guidance to GSA contracting activities pending a permanent revision to the regulation.

DATES:

Effective Date: March 8, 1988.
Expiration Date: March 7, 1989.

FOR FURTHER INFORMATION CONTACT: Ms. Shirley Scott, Office of GSA Acquisition Policy and Regulations (VP), (202) 523–4766.

SUPPLEMENTARY INFORMATION: This rule was not published in the **Federal Register** for public comment because it merely implements and supplements a higher level issuance that was previously published for public comment. The Director, Office of Management and Budget (OMB), by memorandum dated December 14, 1984, exempted certain agency procurement regulations from Executive Order 12291. The exemption applies to this rule. The General Services Administration (GSA) certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The rule simply implements and supplements the FAR and OMB Circular A–125 requirements regarding the Prompt Payment Act. Accordingly, no regulatory flexibility analysis has been prepared. The rule does not contain any additional information collection requirements beyond those already imposed by OMB which require the approval of OMB under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) The information collection regarding electronic funds transfers was approved by OMB pursua[illegible] request from the Depar[illegible] of the Treasury. OMB Contro[illegible] 1510–0068 was assigned to this information collection.

List of Subjects in 48 CFR Parts 501, 532 and 552

Government procurement.

1. The authority citation for 48 CFR Parts 501, 532 and 552 continues to read as follows:

Authority: 40 U.S.C. 486(c).

2. 48 CFR Parts 501, 532 and 552 are amended by the following Acquisition Circular:

General Services Administration Acquisition Regulation Acquisition Circular (AC-88-1)

To: All GSA contracting activities.
Subject: Implementation of Federal Acquisition Circular (FAC) 84-33.

1. *Purpose.* This Acquisition Circular temporarily amends the General Services Administration Acquisition Regulation (GSAR) Chapter 5. (APD 2800.12) to implement and supplement the Federal Acquisition Regulation (FAR) as amended by FAC 84-33.

2. *Background.* The Federal Acquisition Regulation (FAR) was amended by FAC 84-33 to implement Office of Management and Budget (OMB) Circular A-125. "Prompt Payment." FAC 84-33 also amended the FAR to provide policy and procedures on ratification of unauthorized commitments. This Acquisition Circular amends the GSAR as necessary to conform to the FAR as amended by FAC 84-33.

3. *Effective date.* March 8, 1988. All solicitations issued on or after March 8, 1988, shall include the clauses prescribed by this Circular.

4. *Expiration date.* This Acquisition Circular expires March 7, 1989, unless canceled earlier.

5. *Reference to regulation.* Sections 501.675, 501.675-1, 501.675-2, 501.675-3, 532.111, 552.232-70, 552.232-71, 552.232-72, and 552.232-73 of the General Services Administration Acquisition Regulation.

6. *Explanation of changes.*

a. Section 501.602-3 is added to read as follows:

501.602-3 Ratification of unauthorized commitments.

(a) *Authority.* Subject to the limitations and in accordance with the procedures prescribed in FAR 1.602-3, contracting officers may ratify contractual commitments made by employees who do not have the requisite authority to enter into contracts on the Government's behalf if the head of the contracting activity (HCA) has approved the ratification action. The authority to approve ratification actions may not be redelegated.

(b) *Procedures.* (1) Generally, the Government is not bound by agreements or contractual commitments made by persons to whom contracting authority has not been delegated. Such unauthorized acts may be in violation of the Federal Property and Administrative Services Act, other Federal laws, the FAR, the GSAR, and good acquisition practice. Therefore, such unauthorized contractual commitments should be considered as serious employee misconduct and consideration given to initiating disciplinary action. In any instances where suspected irregularities may involve fraud against the Government, or any type of misconduct which might be punishable as a criminal offense, either the employee's supervisor or the contracting officer should immediately report the matter to the Office of the Inspector General with a request for a complete investigation.

(2) The individual who made the unauthorized commitment shall furnish the appropriate contracting director all records and documents concerning the commitment and a complete written statement of facts, including, but not limited to, a statement as to why normal acquisition procedures were not followed, why the contractor was selected and a list of other sources considered, description of work or products, estimated or agreed contract price, citation of appropriation available, and a statement regarding the status of the performance. Under exceptional circumstances, such as when the person who made the unauthorized commitment is no longer available to attest to the circumstances of the unauthorized commitment, the contracting director may waive the requirement that the responsible employee initiate and document the request for ratification, provided that a written determination is made stating that a commitment was in fact made by an employee who shall be identified in the determination.

(3) The appropriate contracting director will assign the request for ratification action to an individual contracting officer for processing. The contracting officer assigned the action will be responsible for preparing a summary statement of facts addressing the limitations in FAR 1.602-3(c) and making a recommendation as to whether the transaction should be ratified and stating the reasons therefore. Advice against ratification should include a recommendation for other appropriate disposition. When ratification is not permissible due to legal improprieties in the procurement, the contracting officer may recommend that payment be made for services rendered on a quantum merit basis (the reasonable value of work or labor) or for goods furnished on a quantum valebant basis (the reasonable value of goods sold and delivered) provided there is a showing that the Government has received a benefit. (See also FAR 1.602-3(d)).

(4) The request for ratification, the information required by paragraph (b)(3) above, and a recommendation for corrective action to preclude recurrence, must be forwarded, through appropriate channels, to the HCA for consideration.

(5) The HCA, upon receipt and review of the complete file, may approve the ratification if determined to be in the Government's best interest, or direct other disposition as appropriate. Acquisitions which have been approved for ratification shall be forwarded to the appropriate contracting officer for issuance of the necessary contractural documents. If the request for ratification is not justified, the HCA shall return the request without approval and provide an explanation for the decision not to approve ratification.

(6) Each HCA shall maintain a separate file containing a copy of each request for approval to ratify an unauthorized commitment. This file shall be made available for review by the Office of Acquisition Policy and the Inspector General.

b. Sections 501.675, 501.675-1, 501.675-2 and 501.675-3 are deleted.

c. Section 532.111 is amended by revising paragraphs (b) and (c) to read as follows:

532.111 Contract clauses.

* * * * *

(b) *Adjusting payments.* The contracting officer shall insert the clause at 552.232-78, Adjusting Payments, in all solicitations and contracts for recurring building services expected to exceed the small purchase limitation.

(c) *Final payment.* The contracting officer shall insert the clause at 552.232-79, Final Payment, in all solicitations and contracts for recurring building services expected to exceed the small purchase limitation.

* * * * *

d. Section 532.904 is added to read as follows:

532.904 Payment due date.

The time specified by the contracting officer for constructive acceptance or approval in subparagraph (a)(6)(i) of FAR basic clause 52.232-25, Prompt Payment, or subparagraph (a)(5)(i) of Alternate I shall usually be 1 day for recurring building services, 5 days for supplies and other nonpersonal services or 30 days for construction, architect-engineer and other professional or technical services, unless some other number of days is justified in the contract file.

e. Section 532.908 is added to read as follows:

532.908 Contract clause.

(a) The Contracting Officer shall insert the clause at 552.232-70 in solicitations and contracts when payments may be made by GSA and other agencies. (e.g. multiple award schedule contracts).

(b) The contracting officer shall insert the clause at 552.232-71 in solicitations and contracts for the acquisition of leasehold interests in real property. Contracting officers shall use Alternate I instead of the basic clause if the lease contract will contain provisions for ordering alterations or overtime utility services. If payment may be made by electronic funds transfer, the contracting officer shall use Alternate II with the basic clause or Alternate I.

f. Section 552.232-70 is revised to read as follows:

552.232-70 Payments by electronic funds transfer.

As prescribed in 532.908(a), insert the following clause:

Payments by Electronic Funds Transfer (Feb 1988)

The requirement that the Contractor submit, no later than 14 days before an invoice or financing request, a designation of a financial institution for receipt of electronic fund transfer payments in paragraph (c) of the clause entitled "Prompt Payment" at FAR 52.232-25 (Alternate II) does not apply to this contract. Instead, the Contractor is directed to submit its designation of a financial institution for receipt of electronic funds transfer payments as a part of, or as an attachment to, each invoice requesting payment of $25,000 or more (exclusive of any discount for prompt payment) unless the invoice is submitted to the Department of Defense, the United States Postal Service, or the Tennessee Valley Authority. Information required for electronic funds transfer payments shall be furnished to the Veterans Administration in accordance with special instructions provided by that agency. Other agencies and departments thereof may waive the requirement for designation of a financial institution for receipt of electronic fund transfer payments and for submission of information required to make such payments by including a notice on delivery orders or otherwise notifying the Contractor.

(End of Clause)

g. Section 552.232-71 is revised to read as follows:

552.232-71 Prompt payment.

As prescribed in 532.908(b) insert the following clause:

Prompt Payment (Feb 1988)

Notwithstanding any other payment clause in this contract, the Government will make payments under the terms and conditions specified in this clause. Payment shall be considered as being made on the day a check is dated or an electronic funds transfer is made.

(a) *Payment due date.*

The initial monthy rental payment under this contract shall become due on the first workday of the month following the month in which the lease or supplemental agreement establishing commencement of the lease term is executed, or the first workday of the month following the month in which the occupancy of space is effective, whichever is later. Subsequent rent shall be paid in arrears, and will be due on the first workday of each successive month, and only as provided for by the lease.

(b) *Interest Penalty.*

(1) An interest penalty shall be paid automatically by the Government, without request from the Contractor, if payment is not made within 15 days after the due date.

(2) The interest penalty shall be at the rate established by the Secretary of the Treasury under Section 12 of the Contract Disputes Act of 1978 (41 U.S.C. 611) that is in effect on the payment date. This rate is referred to as the "Renegotiation Board Interest Rate," and it is published in theFederal Register semiannually on or about January 1 and July 1. The interest penalty shall accrue daily on the payment amount approved by the Government and be compounded in 30 day increments inclusive from the first day after the due date through the payment date.

(3) Interest penalties will not continue to accrue after the filing of a claim for such penalties under the Disputes clause or for more than 1 year. Interest penalties of less than $1.00 need not be paid.

(4) Interest penalties are not required on payment delays due to disagreement between the Government and Contracter over the payment amount or other issues involving contract compliance or on amounts temporarily withheld or retained in accordance with the terms of the contract. Claims involving disputes, and any interest that may be payable, will be resolved in accordance with the Disputes clause.

(End of Clause)

Alternate I (Feb 1988)

If the lease contract will contain provisions for ordering alterations or overtime utility services, the text of paragraph (a) of the basic clause should be designated as subparagraph (1) and the following subparagraph (a)(2) and paragraph (b) should be added. Paragraph (b) of the basic clause should be redesignated (c).

(a) *Payment due date.*

(2) The due date for making payments for alterations or overtime utilities by the designated payment office shall be the later of the following two events:

(i) The 30th day after the designated billing office has received a proper invoice from the Contractor.

(ii) The 30th day after acceptance of the service.

(b) *Invoice and inspection requirements for alterations and overtime utilities.*

(1) An invoice shall be prepared and submitted to the designated billing office specified in the contract. A proper invoice must include the items listed in subparagraphs (b)(1) (i) through (vii) of this clause. If the invoice does not comply with these requirements, then the Contractor will be notified of the defect within 15 days after receipt of the invoice at the designated billing office. Untimely notifications will be taken into account in the computation of any interest penalty owed the Contractor.

(i) Name and adddress of the Contractor.

(ii) Invoice date.

(iii) Lease number.

(iv) Order number or other authorization for delivery of services.

(v) Description, price, and quantity of property or services actually delivered.

(vi) Name and address of Contractor official to whom payment is to be sent (must be the same as that in the remittance address in the lease or the order).

(vii) Name (where practicable), title, phone number and mailing address of person to be notified in the event of a defective invoice.

(2) The Government agrees to inspect and determine the acceptability of alterations performed or services rendered within 10 calendar days after the date of completion of alterations or performance of services unless a different period is specified for inspection at the time the order is placed. If actual acceptance occurs later, for the purpose of determining the payment due date and calculation of interest, acceptance will be deemed to occur on the last day of the above stated inspection period. However, the Contractor is not entitled to payment of contract amounts or interest unless and until actual acceptance by the Government occurs.

(End of Clause)

Alternate II (FEB 1988)

If payment may be made by electronic funds transfer, add the following paragraph (c) to the basic clause. When Alternate I is used this paragraph should be designated (d).

(c) *Electronic funds transfer.* Payments under this contract will be made by the Government either by check or electronic funds transfer (through the Treasury Financial Communications System (TFCS) or the Automated Clearing House (ACH), at the option of the Government. Not later than 14 calendar days after receipt of a notice of award or request from the Contracting Officer or other Government official, the Contractor shall provide information necessary for check payment and/or designate a financial institution for receipt of electronic funds transfer payments. The Contractor shall submit this information to the Contracting Officer or other Government official, as directed.

(1) For payment by check, the Contractor shall provide the full name (where practicable), title, phone number, and complete mailing address of the responsible official(s) to whom check payments are to be sent.

(2) For payment through TFCS, the Contractor shall provide the following information:

(i) Name, address, and telegraphic abbreviation of the financial institution receiving payment.

(ii) The American Bankers Association 9-digit identifying number of the financing institution receiving payment if the institution has access to the Federal Reserve Communications System.

(iii) Payee's account number at the financial institution where funds are to be transferred.

(iv) If the financial institution does not have access to the Federal Reserve Communications System. name. address. and telegraphic abbreviation of the correspondent financial institution through which the financial institution receiving payment obtains electronic funds transfer messages. Provide the telegraphic abbreviation and American Bankers Association identifying number used for TFCS).

(3) For payment through ACH. the Contractor shall provide the following information:

(i) Routing transit number of the financial institution receiving payment (same as American Bankers Association identifying number used for TFCS).

(ii) Number of account to which funds are to be deposited.

(iii) Type of depositor account ("C" for checking. "S" for savings).

(iv) If the Contractor is a new enrollee to the ACH system. a "Payment Information Form." TFS 3881. must be completed before payment can be processed.

(4) In the event the Contractor. during the performance of this contract. elects to designate a different financial institution for the receipt of any payment made using electronic funds transfer procedures. notification of such change and the required information specified above must be received by the appropriate Government official 30 days prior to the date such change is to become effective.

(5) The document furnishing the information required in this paragraph (c) must be dated and contain the signature. title. and telephone number of the Contractor official authorized to provide it. as well as the Contractor's name and contract number.

(6) Contractor failure to properly designate a financial institution or to provide appropriate payee bank account information may delay payments of amount otherwise properly due.

(End of Clause)

552.232-72 and 552.232-73 [Removed and Reserved]

h. The current text of sections 552.232-72 and 552.232-73 is removed and the sections are reserved.

Patricia A. Szervo.

Associate Administrator for Acquisition Policy.

[FR Doc. 88-4965 Filed 3-7-88; 8:45 am]

BILLING CODE 6820-61-M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 653

[Docket No. 71279-7279]

Red Drum Fishery of the Gulf of Mexico; Extension of Effective Date

AGENCY: National Marine Fisheries Service (NMFS). NOAA. Commerce.

ACTION: Emergency interim rule: extension of effective date.

SUMMARY: An emergency interim rule that reduced the current annual recreational and commercial catch allowances of red drum to zero in the Gulf of Mexico exclusive economic zone (EEZ) is in effect through March 30. 1988. The Secretary of Commerce (Secretary) extends the emergency interim rule for an additional 90 days (through June 28. 1988) to allow the Gulf of Mexico Fishery Management Council (Council) sufficient time to prepare an amendment to the Fishery Management Plan for the Red Drum Fishery of the Gulf of Mexico (FMP) that would continue these zero catch allowances. The intent of this rule is to protect the red drum spawning stock in the EEZ from exploitation until the FMP amendment is implemented.

EFFECTIVE DATE: This rule is effective 0001 hours. local time. March 31. 1988. through 2400 hours. local time. June 28. 1988.

ADDRESS: Copies of documents supporting this action may be obtained from William R. Turner. Southeast Region. National Marine Fisheries Service. 9450 Koger Boulevard. St. Petersburg. FL 33702.

FOR FURTHER INFORMATION CONTACT: William R. Turner. 813-893-3722.

SUPPLEMENTARY INFORMATION: Under section 305(e)(2)(B) of the Magnuson Fishery Conservation and Management Act. the Secretary promulgated an interim emergency rule (53 FR 244. January 6. 1988) effective for 90 days. January 1 through March 30. 1988. in response to an emergency situation in the red drum fishery. The Secretary extends the emergency interim rule for an additional 90 days in accordance with section 305(e)(3)(B) of the Magnuson Act because conditions justifying the emergency action remain unchanged. The 90-day extension will prevent the resumption of red drum harvest in the EEZ.

The initial emergency interim rule prohibited the harvest or possession of red drum in the EEZ of the Gulf of Mexico based on the most recent scientific stock assessment. which indicated that an emergency situation existed regarding the red drum resource. The assessment concluded that red drum less than 12 years of age were poorly represented in the offshore population. and that continued harvest of adults would further reduce the spawning stock and increase the risk of collapse of this fishery.

The Council. at its meeting during the week of January 25. 1988. noted that there is no short-term solution to the resource conditions that exist and recommended that the emergency rule be extended for an additional 90 days. The Secretary reviewed this recommendation and concluded that this extension is consistent with provisions of the Magnuson Act. and will afford protection to the red drum resource while the Council proceeds with an FMP amendment that will continue the zero catch allowances until such time as the FMP objectives are obtained. A detailed discussion of the background. present situation. and classification of the rulemaking is set forth in the initial emergency interim rule and is not repeated here.

All provisions of the emergency interim rule remain effective through June 28. 1988.

This extension of the emergency interim rule is exempt from the usual review procedures of Executive Order 12291 as provided for in section 8(a)(1) of that order. The action is being reported to the Director. Office of Management and Budget. with an explanation of why it is not possible to follow the procedures of that Order.

List of Subjects in 50 CFR Part 653

Fisheries. Fishing. Reporting and recordkeeping requirements.

Dated: March 2. 1988.

James E. Douglas, Jr.,

Deputy Assistant Administrator for Fisheries. National Marine Fisheries Service.

[FR Doc. 88-4877 Filed 3-7-88; 8:45 am]

BILLING CODE 3510-22-M

Electronic Industries Association

STATEMENT OF JEAN A. CAFFIAUX
Sr. Vice President

Electronic Industries Association

Before the Subcommittee on Federal Spending, Budget and Accounting
United States Senate

on the Subject of Reauthorization

of the

Office of Federal Procurement Policy

March 25, 1988

2001 Eye Street, N.W. · Washington, D.C. 20006 · (202) 457-4900 · TWX: 710-822-0148

The Electronic Industries Association (EIA) is pleased to appear before the Committee today in support of reauthorization of the Office of Federal Procurement Policy ("OFPP"). Because many of our 500 member companies are engaged in providing products and services to the Federal Government we have been outspoken in our support for the efforts of the Congress and the Packard Commission to make the federal procurement process more efficient and businesslike.

OFPP PERFORMS A UNIQUE TASK

When OFPP was created in 1974, it was greeted with skepticism by industry and the buying agencies. In the 13 years of its existence, its performance has been criticized only where it has done too little rather than too much. In fact, OFPP does a job that no single agency can do: it brings a uniformity of policy to the world of federal procurement.

OFPP's work extends to every aspect of the regulatory process. It is a key to alleviating the unrelenting pressure of overregulation. It forces the pace on contracting out of gevernment tasks which contractors can usually perform more cheaply than the government can with its own work force. More and more, OFPP has become a board of directors for the buying agencies to ensure that the shareholders - the taxpayers - know how their money is being spent.

OFPP SHOULD BE AUTHORIZED PERMANENTLY

To ensure consistency in procurement policy, we believe that a continuation of OFPP's work is essential. Accordingly, we support the permanent authorization of the OFPP.

The buying agencies often interpret the many procurement laws and regulations in difficult ways and not always consistent with congressional intent and executive branch policies. A strong, permanent OFPP is essential in providing uniformity to the implementation of procurement laws and regulations.

OFPP'S CURRENT CHARTER SHOULD BE RENEWED

OFPP's current broadly-scoped charter gives it the flexibility and authority it needs to perform its principal duty of providing overall leadership and policy direction to the federal procurement system. Within this charter, OFPP is specifically empowered to issue procurement regulations when the buying agencies fail to agree on how a policy should be implemented. It may rescind or order changes to any regulations which, in its sole judgement, conflict with the policy set by law or by OFPP. Finally, its charter designates it as the voice of the Administration on legislation affecting procurement practices and places in it the responsibility for developing and managing the uniform system of procurement regulations which are in place.

Under the direction of Robert Bedell, OFPP has taken on the active and forceful role which its creators had envisioned. Mr. Bedell is to be congratulated for his letter to the Department of Defense, in which he urged that conflicting policies in DoD quality program initiatives be made uniform throughout the Department. Also of note is the recent OFPP letter to DoD concerning necessary changes in government policies in rights in technical data in government contracts. These letters are evidence of OFPP's interest in working with the new Undersecretary of Defense for Acquisition to ensure that executive policies are carried out throughout the Federal Government. This cooperation is essential to the work of all of the agencies, not just DoD.

An additional important area in which OFPP has demonstrated leadership has come with Mr. Bedell's assumption of a coordinating role in developing appropriate methodology for government studies of contractor profitability. In this role, OFPP has sought to forge a consensus among DoD, the General Accounting Office and other concerned parties regarding the true issue in current debate about contractor profitability: the methodology for profit studies.

The effectiveness of OFPP, like so many of the regulatory agencies, depends on operating in a government environment which is conducive to improvement. We believe that the impact of the Packard Commission philosophy which has been so well received in Congress, and the establishment of the office of the Undersecretary of Defence for Acquisition have created such an environment. Under its current leadership, with its broadly-scoped charter, OFPP has become an effective manager of the federal procurement process. We urge this Committee not only to permanently authorize OFPP's charter but to ensure that future administrators are selected on the basis of their capabilities to provide meaningful policy direction in the federal procurement system.

Finally, the strong support of the director of OMB and other senior Administration officials and the Congress is essential to the effectiveness of OFPP. We urge the Administration, and this Committee in its oversight role, to ensure this level of support continues.

We are aware that the Committee is considering the addition of other initiatives to the reauthorization measure. Please consider the following comments on several of those initiatives.

COST ACCOUNTING STANDARDS BOARD

EIA supports the establishment of the functions of the Cost Accounting Standards Board in OFPP, with the understanding that its charter would be expanded to include the following:

1. The function would have exclusive responsibility and authority for allowability as well as the allocability of costs to defense contracts.

2. A membership structured to correspond to the makeup of the board proposed in H.R. 3345, the House bill reauthorizing OFPP.

3. We strongly believe the protections for properly negotiated fixed price contracts contained in section 5(g) of H.R. 3345 should be added to this committee's bill. This "increased costs paid" language is essential to the fair administration of any cost accounting standards system. Without this language every fixed priced contract will be subject to cost reductions whenever there is a change in the cost accounting standards. Competitive pressures are already driving fixed priced contracts to high risk and low profit positions, and do not permit this type of instability.

PROFIT REPORTING PROPOSALS

Industry is strongly opposed to any system of mandatory profit reporting. Several proposals, including H.R. 3134 (The Defense Contractor Profit Review Act) and those made by the GAO, would represent a return to the widely-discredited renegotiation-type practices which penalize innovation, productivity and cost savings.

We believe it is important to reiterate the concerns expressed by Mr. John Rittenhouse, GE/RCA, in his March 18, 1987 appearance on our behalf before the House Government Operations Committee. We have included a copy of Mr. Rittenhouse's statement as Exhibit A to this testimony. We continue to urge the Congress to reject any such proposal for mandatory profit reporting, because it would intrude improperly into the commercial financial data of companies doing business with the government. We believe it is unreasonable to require companies to report their most sensitive financial data as a condition for obtaining a government contract.

Regulation of government contractor profits has been tried time and again over the past fifty years. Each time it has proven to be costly and ineffective. The system under which the buying agencies negotiate profits works. It should not be thrown away by H.R. 3134 or any similar proposal.

CENTRAL PROCUREMENT POLICYMAKING RESPONSIBILITY

One of the difficulties faced by OFPP in asserting its supervisory role is the lack of central procurement policymaking responsibility in each agency. Section 25(d) of H.R. 3345 establishes firmly the authority of a single person in each agency to approve or disapprove all proposed and final procurement regulations. This is, in our view, a considerable improvement over the current situation. It ensures that policy makers, such as the Undersecretary of Defense for Acquisition, are able to create and enforce uniform policies within their agencies.

CONCLUSION

The Electronic Industries Association strongly urges the permanent authorization of the Office of Federal Procurement Policy (OFPP) under the terms of its current, broadly-scoped charter. We would further recommend the addition of a cost accounting standards function to the OFPP charter, but would strongly oppose the creation of a profit reporting/policy making program along the lines proposed by the GAO. We also would suggest establishment of a single, central authority for procurement policymaking within each agency.

Mr. Chairman, we appreciate the opportunity of providing you with our views on this subject, and would be pleased to respond to any questions.

EXHIBIT A

AEROSPACE INDUSTRIES ASSOCIATION
1725 DeSales Street, N.W., Washington, D.C. 20036

ELECTRONIC INDUSTRIES ASSOCIATION
2001 Eye Street, N.W., Washington, D.C. 20006

STATEMENT OF

JOHN D. RITTENHOUSE

EXECUTIVE VICE PRESIDENT

RCA AEROSPACE AND DEFENSE

on behalf of

ELECTRONIC INDUSTRIES ASSOCIATION
and
AEROSPACE INDUSTRIES ASSOCIATION

before the

SUBCOMMITTEE ON LEGISLATION AND NATIONAL SECURITY
COMMITTEE ON GOVERNMENT OPERATIONS
UNITED STATES HOUSE OF REPRESENTATIVES

MARCH 18, 1987

SUMMARY

The General Accounting Office (GAO) has proposed creation of a new agency to study government contractor profits and recommended changes to the policies and regulations governing profits earned by contractors. We urge the Congress to reject this proposal because:

- It unnecessarily intrudes into the commercial business of government contractors;
- It takes profit policy authority and profit studies away from the buying agencies and places them in the hands of a new bureaucracy which is not accountable for the success of procurement programs;
- It is unlikely to produce an accurate portrayal of contractor profits on government contracts;
- It will destabilize government contracting practices;
- It is redundant to laws already in effect; and
- It will discourage productivity.

Government has a legitimate interest in information about the profits earned by its contractors. However, we believe that the GAO proposal fails the tests of good public policy. A more effective, less intrusive option should be pursued which focusses on the key issue: the methodology for studying contractor profit reporting. A commission could be formed to determine an appropriate methodology, based on participation and input by responsible public and private sector officials.

INTRODUCTION

Mr. Chairman and Members of the Subcommittee, my name is John Rittenhouse. I appear before you today on behalf of both the Electronic Industries Association and the Aerospace Industries Association. These two groups represent 500 companies employing over 1.5 million men and women nationwide. The products of these companies cover an extremely broad range -- from automobiles, refrigerators and televisions to satellites, ships, and planes. Most of the member companies, like mine, are deeply involved in both commercial manufacturing and in producing specialized systems for the government.

We appreciate the opportunity to present our views on the GAO proposal which would create a new agency to study the profits of government contractors and recommmend changes to the regulations governing profits earned by all government contractors.

The need for such legislation is difficult for us to see. There is no compelling evidence that the buying agencies have managed their policies poorly. This proposal strikes us as a solution in search of a problem.

We are strongly opposed to this proposal for each of the following reasons:

* It unnecessarily intrudes into the commercial businesses of government contractors, and creates the possibility that proprietary commercial data could be accessed by a firm's competitors;

* It takes the power over profit policy and profit studies away from the buying agencies and places it in the hands of a new bureaucracy which has no accountability for the success of the procurement programs which must use the policy;

* It is unlikely to produce an accurate portrayal of contractor profits on government contracts;

* It will ensure the continual destabilization of government contracting practices in such a way that the actual profitability of government contractors may never be measured accurately;

* It is unnecessary because of existing laws which protect the government from paying unreasonable profits; and

* It will discourage productivity. Profit is the primary motivation for the free enterprise system that our defense establishment seeks to protect. Profit is not a dirty word. The demotivational aspect of profit limitations on government contractors cannot be overestimated, especially when they are just now setting in place productivity programs stimulated by domestic and international competition.

A COMPANY SHOULD NOT BE REQUIRED TO DISCLOSE ITS COMMERCIAL FINANCIAL DATA AS A CONDITION FOR OBTAINING A GOVERNMENT CONTRACT

As we understand it, the proposal would give the new agency and the GAO totally unlimited access to a company's financial records, officers, and employees to make any study that it liked, and as many studies as it liked, of a company's commercial and government businesses.

The government has many legitimate interests in the commercial marketplace. Its powers as sovereign require it to have access to commercial business for the purposes of taxation, securities regulation and to ensure the health and safety of the community. But having performed those sovereign duties, the government has no legitimate interest in a company's commercial dealings. The GAO proposal seeks to impose a wide variety of government accounting practices on commercial businesses under the pretext of studying government contractor profits.

Let there be no mistake about it; for the GAO plan to be implemented, companies' commercial business practices would have to be adapted to the rules of accounting and record-keeping imposed on government contracting. Otherwise, neither GAO nor the Office of Profit Studies and Analysis would be able to use the data they obtain from examining commercial business records.

We understand the desire to have some baseline with which companies' profits on government contracts can be compared. But it is unnecessary and unreasonable to create this baseline by extending the costly regulatory burden of the government contracting systems to commercial business. It is paradoxical that while this proposal's intent is to save the taxpayers money, it would result in the establishment of a new government agency and would impose cost record-keeping burden on commercial business already struggling to remain competitive.

THE BUYING AGENCIES SHOULD HAVE CONTROL OVER PROFIT POLICY

The new Office of Profit Studies and Analysis would be empowered to recommend changes in policies governing contractor profits. In essence, it could change the "weighted guidelines" used in negotiations any time it chose to do so. Its decisions, backed by GAO and Congress, would overrule the judgement of any of the buying agencies. We believe this centralization of profit policy would be contrary to the best interests of the government.

The different agencies create different markets for their contractors. The General Services Administration and most agencies deal principally with commercially-available products which are mass-produced. NASA and the Defense Department deal, to a large extent, with products which must be researched, designed, and developed to meet their specific needs.

Thus, the objectives of profit policies for those two markets must vary greatly, and consequently bear no relationship to one another. Uniformity in profit policy among contracting agencies is therefore contrary to the government's best interest.

Further, the de facto centralization of profit policy will distance acquisition policy from the acquisition process. As the report of the President's Blue Ribbon Commission on Defense Management emphasized, one of the greatest problems of the acquisition system is the separation of accountability from authority. The GAO proposal would create a new bureaucracy with complete power to create profit policy but without any accountability for the effect of those policies on the actual procurement programs.

THE GAO PROPOSAL WILL NOT ACCURATELY MEASURE CONTRACTOR PROFITS

The GAO proposal simply will not give Congress an accurate picture of government contractor profits.

Chapter 3 of the GAO exposure draft says,

> "based on financial data submitted by the companies/segments profitability under PRP will be studied by computing return on assets and other ratios as the administrator deems appropriate."

It goes on to say that:

> "Profitability data (ratios) will be aggregated for similiar companies/ products and comparisons of the companies' profitability made (1) under its government negotiated cost and fixed price contracts where cost and pricing data were submitted and with all of its other business, and (2) with profitability of companies in the private sector providing similar goods and services."

Unfortunately, this method simply doesn't work. Consider the following:

* Government contracts vary greatly within and among companies in terms of type of contract, length of performance, and financing. Companies use a variety of accounting methods in gathering their financial data. Because of these varying conditions, the GAO-proposed aggregation of data will result in an inherently misleading set of findings.

* Studies performed as frequently as every three years cannot measure profits accurately because long-term contracts do not reflect contractor performance under any single set of profit policies. These policies may have changed several times since the contracts were awarded.

THE NEW AGENCY WOULD INSURE THE CONTINUED INSTABILITY OF THE GOVERNMENT CONTRACTING PROCESS

The creation of an agency to deal only with government contractor profits focuses too much energy on only one part of a very large and complicated system. If a manager's only tool is a hammer, pretty soon all his problems will start to look like nails. Whatever OPSA discovers in its studies of profits, whether profit-related or not, will be addressed through recommended changes to profit policies. Any agency, no matter how carefully created, will set an agenda for action and produce some regulation to accomplish it.

The long cycle nature of defense procurement further dictates that any change in policy is unlikely to produce the instant gratification desired by its critics. It will take several years for any profit policy change to affect industry, unless the intention is for the U. S. Government to default on its contractual obligations with industry.

Over the past few years, many reforms of the government contracting process have been enacted by Congress and many of them are still in the process of being implemented by the buying agencies. Consider the cumulative effect of the following:

* Competition has increased in response to the Competition in Contracting Act, and as a result of budget pressures on buying agencies. This expanded competition has increased the cost of doing business. Bid and proposal expenses rise, while markups to manufacturing costs are lowered in order to win competitions. All the while, capture rates on the business that is bid can be expected to be lower.

* While increased competition may be providing the government with some savings, defense contractors have had to lower costs and improve productivity to remain competitive and to have any profit dollars left for reinvestment in current and future programs.

* Cost Sharing -- which means that the government expects defense contractors to underwrite some of the costs for development, tooling and initial production -- now is routine. Whether these initiatives are designed to reduce defense contractor profits or defer budget expenses into the future is not clear, but reduced profits for reinvestment in technology and productivity programs is assured.

* Reduced progress payments will require companies to invest more in work-in-process and reduce company cash flow. Former payments of 90% now have been reduced to 75%.

* Slower government payment of bills has been announced in accordance with the Prompt Payment Act, in itself an interesting juxtaposition of ideas. Government agencies have begun to pay bills 10 days late (i,.e., in 40 days rather than the 30 days standard) to slow outlays, without regard for the cash flow consequences to contractors.

* New allowable cost rules mean that more necessary business costs will come out of profits.

* Tax law changes eliminating or reducing the use of the completed contract method of tax accounting, elimination of investment tax credit, and changes to depreciation rules, all will have direct impact on Government contractor cash position, balance sheets, and investment.

* Congress has directed changes in DoD profit policy with a view to achieving reductions in profit.

* Independent Research and Development (IR&D) recoupment is capped, or may fall, under budget pressures, resulting in reduced investment in our future defense industry. IR&D allocations are frozen or falling at a time when government wants industry to do more, which means that profits will go down, leaving less to reinvest directly in technology developments and productivity improvements.

* Work management rules, increased oversight, and threats of debarment or suspension all demand greater overhead expenses, more pressure on margins, and increased cost sensitivity industry-wide.

As a consequence of the combined impact of these factors, right now, no one--not Congress, not the buying agencies, and not industry--knows what profits will be earned under government contracts in the next few years. If the GAO proposal is enacted and OPSA is created, we will probably never learn. The ground rules will be continually changed, and we will never have stability long enough to even determine what has been done.

THE GOVERNMENT IS PROTECTED BY THE LAWS ALREADY ON THE BOOKS

The focus on contractor profits is, we believe, superfluous in light of laws which are already operating to ensure against unreasonable profits.

Most major contracts are negotiated, in whole or in part, after competition. In these negotiations one of the principal items discussed is the amount of contractor profit. Profit objectives are determined by the goverment on the basis of guidelines which assess such things as contractor risk, investments required, and the realism of cost and schedule estimates. Backing up the government's position is an exhaustive examination of the contractor's cost and pricing data which consists of every bit of information in the contractor's possession which has a bearing on the cost elements of the offer.

Under the Truth in Negotiations Act, which was strengthened just last year, the contractor must provide certified cost and pricing data to the government in order to ensure that both the government and contractor negotiators have the same level of knowledge on the cost elements of the offer.

By the time the contract is completed, the level of profits earned invariably differs from the agreed-on markup. Costs change, schedules change and the results may enhance or eliminate the contractor's profit. The actual profits can be anywhere on the map but the price to the government remains the same.

The markup objective agreed upon by the government and the contractor, therefore, really is the wrong thing for Congress to focus on. Instead, it should focus on the price the government pays for what it buys. The Competition in Contracting Act (1984) has already provided the government the leverage for doing just that.

FURTHER PROFIT CONTROLS ARE CONTRARY TO THE GOVERNMENT'S BEST INTEREST

To a large extent, profits in the defense sector already are controlled by the rules under which we operate. However, on fixed price contracts we do have an incentive to improve profit margin, after negotiation, by productivity improvements. These productivity improvements are necessary for us to remain competitive defense suppliers in both the domestic and world markets. Removal of this motivation by legislated profit caps simply is the wrong thing to do. What it portends is a move from our current position of over-regulation of the defense industry, to de facto nationalization.

AN ALTERNATIVE TO THE GAO's PLAN

There are many possible alternatives to the GAO's plan, including continued reliance on current policies and practices, which recently have been changed and strengthened. The subcommittee may wish to consider a further step in the form of establishing a Blue Ribbon Commission.

Congress could establish such a commission, comprised of public and private sector members, to assess the impact of the recent changes which will in our view significantly reduce profits on government contracts, and to craft an appropriate methodology for studying contractor profit reporting.

The commission would report its findings to the President within a year. At that time, the Congress could determine if further legislation was necessary.

We believe this alternative could resolve the continued conflict over profit without the dangers inherent in the GAO proposal.

STATEMENT
on
THE REAUTHORIZATION OF THE OFFICE OF FEDERAL PROCUREMENT POLICY
before the
SUBCOMMITTEE ON FEDERAL SPENDING, BUDGET, AND ACCOUNTING
of the
SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS
for the
U.S. CHAMBER OF COMMERCE
by
Clarence T. Kipps, Jr.
March 25, 1988

Mr. Chairman and members of the Subcommittee, my name is Clarence T. Kipps, Jr. I am a senior member of the law firm of Miller and Chevalier, Chartered. I am testifying today as a member and representative of the U.S. Chamber of Commerce.

The Chamber is the world's largest federation of business companies, chambers of commerce, and trade and professional associations. More than 92 percent of the Chamber's members are small firms with fewer than 100 employees; 59 percent with fewer than 10 employees. Moreover, virtually all of the nation's largest companies are active members. The Chamber is cognizant of the problems facing small businesses, as well as the problems facing the business community-at-large.

Many of the Chamber's members, both large and small businesses, provide a variety of goods and services to the federal government. However, many have been deterred from doing business with the government because of myriad laws and regulations affecting government contracting. As a result, the Chamber strongly supports the reauthorization of the

Office of Federal Procurement Policy (OFPP), so it can continue to lead the various government agencies in developing an appropriate and uniform policy.

OFPP Reauthorization

In 1969, Congress created the Commission on Government Procurement to study all aspects of procurement by the federal government and to make recommendations for increasing economy, effectiveness, and efficiency in the procurement of goods and services. This Commission submitted its final report in 1972, recommending that OFPP be established to provide uniform direction for procurement by all federal agencies. In response to this recommendation, Congress passed the Office of Federal Procurement Policy Act (P.L. 93-400) in 1974, establishing OFPP within the Office of Management and Budget. OFPP was reauthorized in 1979 and again in 1983 and has continued to seek improvements in the federal procurement process.

Since the last reauthorization, there have been some successes and some problems at OFPP. However, the Chamber particularly has been pleased with OFPP's efforts during the past several months. For example, OFPP has been responsive in the development of a draft uniform policy for technical data rights. It also has been instrumental in forming a cooperative task group consisting of representatives from the Department of Defense (DOD) and the General Accounting Office (GAO) to develop a consistent and appropriate profit methodology to be used by buying agencies when conducting profit studies. The Chamber believes that with proper authority and staffing, OFPP can fulfill its statutory mission, as well as the expectations of the Commission and the federal procurement community.

The Chamber understands that this Subcommittee will consider other issues in concert with OFPP reauthorization and offers the following comments.

Regulatory Authority

In support of the Administration's position that current OFPP authority is sufficient, the Chamber believes that OFPP should have the regulatory authority necessary, first, to develop and impose executive branch policy and, second, to implement Congressional directives in the event that the buying agencies either fail to follow policy guidance or fail to act in a timely manner.

Regulatory Process

The Chamber supports recent actions taken to ensure that a single system of government-wide procurement regulations is developed, issued, and maintained in an efficient manner. While several actions have been taken to underscore that effort, it highlights two in particular.

First, the three procurement agencies that have responsibility for issuing the Federal Acquisition Regulations (FAR)--Department of Defense, General Services Administration, and the National Aeronautics and Space Administration--have agreed on a plan for eliminating duplication and delays in their respective activities. Lead agency responsibility for the various sections of the FAR was restated, and cooperation between the Defense Acquisition Regulatory (DAR) Council and the Civilian Agency Acquisition Council has improved.

Second, based on evidence from recent OFPP studies and a DOD Inspector General report indicating duplication and inconsistencies in agency supplements to the FAR, the OFPP Administrator requested that each department and agency complete a review of its FAR supplements by October 1.

The DAR Council also routinely provides the public with the current status of cases under its review. On an _ad hoc_ basis, the DAR Council staff has been willing to meet with industry to review significant regulatory issues that affect contractors before regulations are issued. This dialogue has increased industry's understanding of the federal government's requirements for regulatory coverage and has increased the federal government's awareness of practical problems with implementation. Further, the DAR Council has held several public briefing sessions around the country to explain the significant regulatory matters under review. These meetings have facilitated the exchange of information between the regulators and the regulated. The Chamber encourages DOD to continue these regional sessions.

The Chamber also notes that Section 25(d) of the OFPP Act, as added by Section 4 of the House bill (H.R. 3345), would establish firmly the authority of a single official in each agency to approve or disapprove all proposed and final procurement regulations. We understand the Senate bill includes the same type of provision. The Chamber believes that this is an improvement over the current situation. It would ensure that policymakers, such as the Under Secretary of Defense for Acquisition, have uniform policies within their agencies.

Cost Accounting Standards Board

The Cost Accounting Standards Board, established under Section 5 of the House bill, closely reflects the industry consensus developed over many years, and the Chamber supports that formulation. We understand and are concerned that the draft Senate bill takes a different approach. The Chamber believes that the Board should have final regulatory authority on its decisions and that industry and government should have equal representation. Furthermore, we believe that the Board, in issuing any interpretation of current standards, should be perspective only. Similarly, the definition of "increased costs" paid by the government should exclude changes in fixed-price contract awards prior to the Board's pronouncement. In addition, some minor changes are needed in the House bill, such as eliminating the enforcement authority of both the Cost Accounting Standards Board and the OFPP Administrator.

The Chamber feels it is very important to keep "equity" as a criterion in the establishment of the cost accounting standards or principles as contained in Section 5 (F)(1) of the House bill. Equitable allocation of costs has always been a criterion in the acquisition regulations. Uniformity and consistency without equity is arbitrariness.

Profit Initiatives

The Chamber supports the requirement in the Senate bill and Section 7 of the House bill for OFPP to review and to determine an appropriate methodology to be used by the buying agencies whenever they conduct future studies of contractor profits. The extensive debate over GAO's ill-conceived initiative to require profit reporting and studies has confirmed that studies of contractor profits should be left with the buying agencies. The Chamber remains adamantly opposed to any proposal for mandatory reporting of contractor profits.

Procurement Integrity

The Chamber believes that Section 6 of the House bill, entitled "Procurement Integrity," is unnecessary and counterproductive. More than enough legislation has been enacted over the past few years to address this area. Because these laws are relatively new, their impact will not be felt entirely for several years. There is no need for new legislation, and certainly there is no need to act now without evidence that existing law is inadequate.

Conclusion

The Chamber strongly supports the reauthorization of OFPP. However, additional responsibilities and duties for OFPP must be considered with great care.

Thank you, Mr. Chairman, for this opportunity to testify. I would be pleased to answer any questions.

STATEMENT OF ROBERT TRIMBLE
ON BEHALF OF
AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC.
CONCERNING THE
REAUTHORIZATION OF THE OFFICE OF FEDERAL PROCUREMENT POLICY
BEFORE THE
SUBCOMMITTEE ON FEDERAL SPENDING, BUDGET AND ACCOUNTING
COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

March 25, 1988

Mr. Chairman and Members of the Subcommittee:

My name is Robert Trimble. I hold the position of Vice President - Contracts for Martin Marietta Corporation; however, I am appearing today on behalf of the Aerospace Industries Association of America, Inc. (AIA) in which organization I serve as Chairman of the Procurement and Finance Council. AIA is the trade association representing the nation's major manufacturers of aircraft, aircraft engines, helicopters, spacecraft, missiles, space launch vehicles, and their related components and equipment. We very much appreciate the opportunity to appear at this hearing on a subject of great interest to our industry, and one in which I have a personal interest, having served as an Assistant Administrator for Procurement Policy in the Office of Federal Procurement Policy (OFPP) during the 1975-1977 time period. AIA wishes to recognize and to applaud the strong leadership role that Senator Chiles has played in the area of procurement policy for the last eighteen years.

AIA and its member firms strongly support the reauthorization of OFPP on a permanent basis. We assess its past performance and future value to justify fully this action. Clearly, our central Government within the Executive

Branch needs an oversight capability with policy management capabilities for the vital federal procurement function. By way of example, recent actions taken by OFPP that display the value of their work in what is often a disparate field of rules and regulations include policy positions taken on product quality (GET SPEC), technical data, prompt payment, profit methodology, and commercial purchasing procedures. We have found that to an increasing degree in recent years, separate buying activities have pursued policies with ill-defined objectives that have greatly complicated the procurement process. It is clear to those of us responding to the nation's requirement for goods and services through the contracting processes that OFPP can provide the leadership to ensure that procurement regulations are consistent with sound acquisition policy and in compliance with Congressional intent. We believe it to be imperative that OFPP maintain an influential role in ensuring that agency procurement regulations and the Federal Acquisition Regulations are consistent with Executive Branch policies and appropriate legislation.

In addition to urging permanent reauthorization of OFPP, we also believe that it is vitally important to sound, economic, and efficient procurement that OFPP receive substantial support from the President, the Congress and the Director of the Office of Management and Budget (OMB). OFPP's effectiveness is dependent not only upon the individual who is appointed as Administrator, but also on the support he or she receives from Congress and the Administration. OFPP plays a vital role in coordinating the establishment of Administration positions regarding those legislative initiatives relating to procurement. The Director of OMB should ensure that this role is continued and strengthened.

To continue its role, OFPP must be assured of personnel grade levels necessary to attract the most knowledgeable and competent procurement professionals. Over the years, the quality of OFPP's professional staff has varied greatly. We recommend that OMB and the Congress authorize OFPP to raise its grade levels in order to attract the talent necessary to carry out its functions in an effective manner.

We are aware that the Subcommittee is considering assigning to OFPP a number of additional functions, including cost accounting standards and determining methods for conducting future profit studies. We support the establishment of an independent Board, chaired by the Administrator of OFPP, to handle cost accounting standards. Such a Board should have: 1) strong industry and professional accounting representation; 2) industry representation in equal number to those representing the Government; and, 3) exclusive actual authority over both cost accounting standards governing measurement, assignment, and allocation of costs and cost principles governing allowability of costs on contracts with the Government. Rules relating to costs subject to cost accounting standards and to cost principles promulgated by a duly constituted Board should prevail and not be subject to differing regulations established by a federal agency that differ, by being either inconsistent, or more or less restrictive.

We support assigning to the Administrator of OFPP the responsibility to determine methods for future profit studies. However, as previously noted, industry is strongly opposed to any system of mandatory profit reporting. Industry has supported and will continue to support the joint DoD, GAO, OFPP effort to establish an agreed upon methodology for future profit studies to be performed by the buying agencies.

The concepts of mandatory profit reporting, particularly when coupled with sanctions on companies earning profits deemed "excessive", are inconsistent with the incentives for cost savings and technological advancement which Congress, the Department of Defense, and industry have carefully devised. Furthermore, Government review of commercial profits serve no useful purpose. Comparisons on government and commercial business are an "apples to oranges" comparison and are, therefore, not meaningful or relevant. We believe that unrestricted access to commercial profit data will have a chilling effect on companies' willingness to compete for government business.

Profit regulation is not a new concept. For example, the Renegotiation Board, which also audited profits and attempted to recoup those which were "excessive," was disbanded almost ten years ago when Congress determined that it was spending far more for audits and legal fees than it was recovering. Competition, both for price and quality, as appropriate, is far more effective and consistent with democratic principles of free enterprise and fair dealing.

We are aware that there are other issues which have been discussed as potential additions to this legislation. However, we firmly believe that the OFPP Reauthorization measure should not be used as a vehicle for those provisions which are not an integral part of the Office of Federal Procurement Policy function.

In summary, AIA strongly supports the reauthorization of OFPP. We also support the creation of an independent Board with responsibilities for cost accounting standards and cost principles, to be chaired by the OFPP Administrator. Responsibility for profit policy must remain with each individual procurement agency as an integral aspect of holding those responsible for the management of the acquisition process accountable for their assigned duties and responsibilities.

In the commercial sector, it is value and quality that drive consumer choices. Effective competition is the self-regulating mechanism of insuring both. Arbitrary bureaucratic constraints and regulatory measures are, at best, poor substitutes for good business judgment and efficient management. OFPP offers the promise of insuring a "level playing field" with fair, consistent, well-reasoned and integrated policies to govern the behavior of the players. That is all that should be sought or needed.

I will now be glad to answer any questions you might have.

AMERICAN SUBCONTRACTORS ASSOCIATION

Statement on Reauthorization of the Office of Federal Procurement Policy

The American Subcontractors Association is a national trade association with more than 7,200 firms representing all major construction trades in 59 chapters. In addition to its individual company members, ASA represents 15 other specialty trade associations with members of their own (See Appendix A).

ASA is the only national organization that speaks exclusively for the interests of construction subcontractors. ASA is dedicated to improving general business conditions for subcontractors through unified and cooperative actions.

Many ASA members perform construction for the federal government. According to a 1987 survey, nearly 63 percent perform on federally-owned construction (See Appendix B). That percentage increases dramatically when you add in those who perform on federally-funded construction. Sometimes ASA members serve as prime contractors, contracting directly with the federal government. More often, they serve as subcontractors, dealing with the government only through a prime contractor. In both situations, the procurement practices of the federal government have a direct impact on these construction contractors.

AMERICAN SUBCONTRACTORS ASSOCIATION, INC.
1004 DUKE STREET, ALEXANDRIA, VA 22314-3512
(703) 684-3450

ASA strongly supports the reauthorization of the Office of Federal Procurement Policy. If the Federal Government is ever to present anything approximating a single face to its contractors, especially its small business contractors and subcontractors, OFPP is our best hope. This is the reason it was created in 1974, and why it has twice before been reauthorized. It is the reason it must be reauthorized again, with the powers necessary to do the job.

If OFPP is to provide leadership in rationalizing and simplifying federal procurement policy, it must have the tools to do so. It must be able to issue policy directives and see them implemented in the Federal Acquisition Regulation. It must have the tools to manage, and if need be discipline, the FAR system.

As we are all painfully aware, the Government-wide FAR has been joined by a host of agency supplements. These supplements were to address operating details and unique requirements. The challenge for the contractor community and for OFPP has been to restrain the seemingly irresistible urge of the agencies to add directly to their own supplements rather than seeking modification to the FAR.

The challenge remains and OFPP must be invested with the authority to meet it. Obviously, it must also have an Administrator willing to exercise the authorities inherent in OFPP's position within OMB and explicit in its statutory mandate.

ASA is pleased to say that after an excessively long and debilitating vacancy, the appointment of Robert Bedell has restored OFPP's role as an important player. He came at a time when the acquisition process has been subjected to substantial change, especially within the Department of Defense. The challenge to hold the FAR system together has grown more difficult to meet.

Amid the flood of change, agencies have taken the opportunity to go their own way. Even within the Department of Defense, the individual military services have chosen to initiate their own independent policies, rather than take the effort to arrive at a common position for the DOD FAR Supplement. Only a strong OFPP, working in cooperation with the agency procurement executives, can preserve us from what could become regulatory anarchy, if left unchecked.

While we have it made clear that ASA is a staunch supporter of a strong OFPP, we would like to share just one example of how OFPP's policymaking authority can be thwarted, if an agency chooses to go its own way and the OFPP Administrator chooses to permit it to happen.

History of OFPP Policy Letter 83-1 Withholding of Funds from Construction Contract Progress Payments

November 18, 1981	Rep. Parren Mitchell (D-Md.), chairman of the House Small Business Committee, introduces H.R.5022, the "Small Business Contract Payment Procedures Act"
October 28, 1982	Senator Lowell Weicker, Jr. (R-Conn.), chairman of the Senate Small Business Committee, introduces S.1782, the "Small Business Contract Payment Procedures Act"
May 5, 1982	Procuring agencies, in testimony before the House Small Business Committee, say legislation is not necessary to change retainage practices of federal government
August 18, 1982	Procuring agencies, in testimony before the Subcommittee on Federal Expenditures, Research and Rules of the Senate Governmental Affairs Committee, say that legislation is not necessary to change retainage practices of federal government
October 1, 1982	Senate passes S.1782, the "Construction Contract Payment Procedures Act of 1982"
November 16, 1982	OFPP issues for comment a proposed policy letter to establish a Government-wide policy on retainage
April 28, 1983	Senator John C. Danforth (R-Mo.), chairman of the Subcommittee on Federal Expenditures, Research and Rules of the Senate Governmental Affairs Committee, introduces S.1181, the "Construction Contract Payment Procedures Act of 1983," stating "nothing has come from the people in OMB who think we should not get involved in this retainage question"
May 6, 1983	OFPP issues Policy Letter 83-1, Withholding of Funds from Construction Contract Progress Payments
September 26, 1983	GSA amends the FPR to comply with OFPP Policy Letter 83-1

April 1, 1984	The Federal Acquisition Regulation becomes effective, but does not comply with OFPP Policy Letter 83-1
February 21, 1986	DOD issues a proposed rule contrary to OFPP Policy Letter 83-1
March 27, 1986	OFPP advises the DAR Council that its proposed rule is contrary to OFPP Policy Letter 83-1
April 21, 1986	The final DFAR rule is published with no changes
May 9, 1986	OFPP again objects to the DAR Council about the now final rule's failure to comply with OFPP Policy Letter 83-1
May 30, 1986	The FAR is amended to provide for a retainage policy consistent with OFPP Policy Letter 83-1
December 1, 1986	DOD issues an interim rule restating DFARS guidance that is inconsistent with the FAR and OFPP Policy Letter 83-1
June 5, 1987	OFPP advises the DAR Council that its interim rule is inconsistent with the FAR and OFPP Policy Letter 83-1

If OFPP's policymaking authority is to mean anything, OFPP policy letter's cannot be merely ignored. If compliance cannot be obtained by request, ASA believes this is the type of situation in which the OFPP Administrator should take the "club out of the closet" and exercise the recision authority provided by the Congress.

The tortured saga of the retainage issue also reflects another dilemma we face nearly every day--that is the argument by Executive Branch officials that Congress should not "micromanage" the procurement process. Statutes should address broad policy; operating details, and solutions to operational problems are best left to the flexibility of the regulatory process, which is more responsive. But, in our opinion, this responsiveness is too frequently mythical, and the flexibility is the license to avoid taking action.

Let us present another example that is close to this Subcommittee's heart. In August of last year, this Subcommittee conducted a hearing on "Personal Sureties Under the Miller Act: Inadequate Payment Protection for Small Business Construction Subcontractors." During that hearing, Chairman Chiles and Administrator Bedell agreed that the solution to this problem would be better left to regulation.

At the time, ASA was sorely tempted to challenge OFPP and the Chairman to a race to the President's desk. There was little doubt in our mind that, although the regulatory route may be more appropriate, it may be faster to enact corrective legislation. And while the regulatory process dragged on, hundreds of subcontractors would pay the price of no true payment bond protection on federal construction.

True to his word, after the hearing, Mr. Bedell sent a letter to the Civilian Agency Acquisition Council, requesting that it undertake a comprehensive review of the use of individual surety bonds. We have been told by one OFPP staff member to expect to wait ten to fourteen months for further action. To small businesses waiting for an answer, that is an unconscionably long period of time.

Again, we think this is the kind of issue in which we believe OFPP can use its authority to expedite the regulatory process.

Summary

ASA strongly supports the reauthorization of OFPP, with the necessary authority to meet its mission--policy direction and leadership to the federal procurement system. We urge the Office and its Administrator to take every action to assure that its mission is met. And we urge this Subcommittee to work with OFPP to create an environment in which it can expeditiously meet its mission.

Appendix A

American Subcontractors Association National Associations' Council Members

ADSC: The International Association of Foundation Drilling Contractors

American Architectural Manufacturers Association

American Institute of Steel Construction

Architectural Precast Association

Association of the Wall & Ceiling Industries - International

Ceiling and Interior Systems Construction Association

Concrete Sawing & Drilling Association

Institute of the Ironworking Industry

Insulation Contractors Association of America

National Association of Elevator Contractors

National Glass Association

National Ornamental & Miscellaneous Metals Association

National Roofing Contractors Association

Painting and Decorating Contractors of America

Appendix B

American Subcontractors Association
Survey on Federal Construction*

Question #1:
Do you perform work on federal construction projects?

Yes: 62.7%
No: 37.3%

Question #2:
What is your approximate annual sales volume?

Annual Volume	Total Respondents	Respondents Who Perform Federal Construction	Respondents Who Do Not Perform Federal Construction
Less than $500,000	13.2%	73.8%	26.2%
0,000-$2 million	36.8%	71.4%	28.6%
$2 million-$5 million	27.3%	55.3%	44.7%
$5 million-$10 million	12.3%	56.8%	43.2%
$10 million-$25 million	8.2%	48.0%	52.0%
Over $25 million	2.2%	28.6%	71.4%

Question #3:
What percentage of your annual sales volume is on federal construction?

Range:	00.01%-90%
Mean:	18.8%
Median:	15%
Mode:	10%

---

* Methodology: A survey questionnaire on federal construction practices was sent by the National Office of the American Subcontractors Association to 1,000 construction subcontractors randomly selected from its membership list on March 27, 1987. The completed forms were returned to the ASA National Office between April 3 and April 17, 1987. Completed questionnaires were returned by 322 of the 1,000 members to which the survey was distributed, representing a 32.2 percent response rate.

STATEMENT OF THE PUBLIC CONTRACT LAW SECTION
OF THE AMERICAN BAR ASSOCIATION TO
THE SUBCOMMITTEE ON FEDERAL SPENDING, BUDGET
AND ACCOUNTING OF THE
COMMITTEE ON GOVERNMENTAL AFFAIRS OF THE
UNITED STATES SENATE

March 25, 1987

The American Bar Association's Section of Public Contract Law ("Section") appreciates the opportunity to comment on legislation to reauthorize the Office of Federal Procurement Policy ("OFPP") presently before the Committee on Governmental Affairs of the United States Senate. The views expressed are those of the Section. They have not been considered or adopted by the American Bar Association's Board of Governors or its House of Delegates and should not be construed as representing the position of the American Bar Association.

The Public Contract Law Section represents approximately 3,500 lawyers who specialize in federal and state procurement law. Included in the Section's membership are private attorneys, legal counsel for businesses and corporations, and numerous government attorneys representing the executive, judicial and legislative branches of the federal government.

In response to the Subcommittee's invitation dated March 16, 1988, the Section is pleased to comment and provide the testimony of Mr. C. Stanley Dees, Chairman of the Section. For a more detailed analysis, the Section directs the Committee members' attention to a letter dated February 12, 1988 addressed by the Section to Senator Chiles commenting on the House of Representatives' OFPP Reauthorization Bill, H.R. 3345.

I. REAUTHORIZATION OF OFPP FOR A FOUR-YEAR PERIOD

The Section strongly endorses congressional reauthorization of OFPP and recommends that at least a four-year extension be adopted. Centralized Executive Branch responsibility and leadership for developing procurement policies, reviewing regulations, and monitoring ongoing procurement operations are essential to improving the efficiency and effectiveness of the government procurement process. Reauthorization of OFPP would provide this needed leadership by placing ultimate responsibility for procurement-policy decisions in a body independent of the various contracting agencies.

II. AUTHORITY OF THE OFPP ADMINISTRATOR

The Subcommittee's bill appears to amend 41 U.S.C. § 405(b) by giving the administrator authority to promulgate regulations if the agencies do not issue regulations implementing OFPP policy. We note this differs from the authority to issue regulations provided by H.R. 3345 (as an amendment to 41 U.S.C. § 405(a)). The Section believes that the ultimate authority of the administrator to promulgate regulations should be very clear and OFPP should not be required to delay action for long while determining whether the promulgating agencies are going to act. We suggest language in the bill along the lines of H.R. 3345 or, at least, in an accompanying report that makes clear that OFPP is expected to promulgate regulations when necessary to carry out the OFPP Act and OFPP policies.

The Subcommittee's bill does not amend 41 U.S.C. § 405(f) to give the administrator (rather than the Director of OMB) the authority to deny promulgation of or rescind a regulation which is contrary to the OFPP Act or the OFPP policies. The Section believes that the administrator is the appropriate person to have this role consistent with the concept of an OFPP. We urge the Subcommittee to accept this proposal in H.R. 3345.

III. ESTABLISHMENT OF A SINGLE FEDERAL ACQUISITION REGULATORY COUNCIL

The Section supports the Subcommittee's efforts to establish a single Acquisition Regulatory Council. However, the relationship between this single council and the two existing Acquisition Regulatory bodies, the Defense Acquisition Council and the Civilian Agency Acquisition Council is not spelled out in the bill. Without clarification, the single council might be interpreted as supplanting the existing regulatory bodies and, in so doing, leave uncertain the legal status of the respective independent regulatory authorities. The role of the new council should be spelled out.

IV. REESTABLISHMENT OF THE COST ACCOUNTING STANDARDS BOARD

The Section strongly supports the legislative establishment of a new Cost Accounting Standards ("CAS") Board. However, the Section disagrees with three aspects of the Subcommittee's bill.

First, the coverage is unnecessarily broad and will greatly expand the costs of administration, without producing any corresponding benefits. Coverage should be changed to correspond with the coverage established by law and regulation at the time the CAS Board expired. Accordingly, Section 26(f)(2) should be modified to limit coverage to negotiated contracts, except for those where the price negotiated is based on (A) established catalog or market prices of commercial items sold in substantial quantities to the general public, (B) adequate price competition, or (C) prices set by law or regulation.

Second, the Section disagrees with the bill's failure to include any authority for the CAS Board to decide accounting principles governing allowability of costs. The Section believes that the CAS Board's authority should be broad and include responsibility for establishing standards and methods for determining cost allowability. The Section recognizes the agency's need (at high secretarial level) to establish policy on allowable costs; however, the CAS Board should provide assistance with development of government-wide accounting standards to implement such policies. In summary, there is a distinction between the role of a procuring agency in deciding what costs are allowable and the role of the CAS Board in establishing the methods and standards for determining the amounts of allowable and unallowable costs.

Third, the Section urges adoption of procedures for notice and public comment in connection with the promulgation of rules, regulations, cost accounting standards, cost principles and modifications by the CAS Board. Although promulgations of CAS Board are proposed to be exempt from judicial review under APA, this legislation should make clear that administrative due process is required. Moreover, judicial review is provided for contract disputes arising out of the application of the Cost Accounting Standards under the Contract Disputes Act.

V. CONCLUSION

The Section supports the Subcommittee's legislation directed at reauthorization of the OFPP and reinstatement of the CAS Board. Both are laudable goals which will enhance the Federal procurement system. The Section offers to assist the Subcommittee by making the resources of the Section's committees available.

Chart 1.

GAO Federal Procurement-Related & RDT&E Outlays (Constant FY82 Dollars)

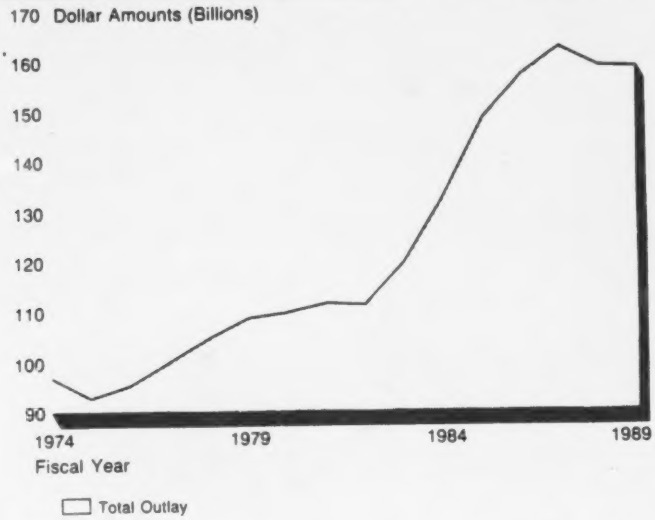
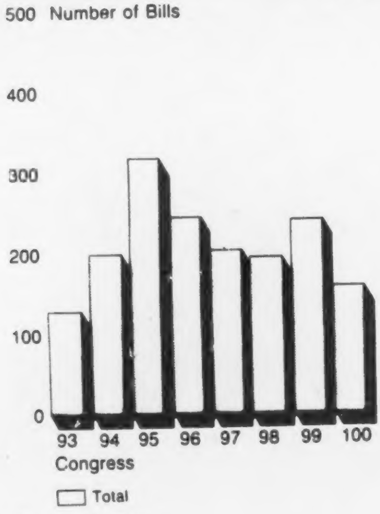


Chart 2

GAO Legislation Related to Procurement (Gov't Procurement & Public Contracts)

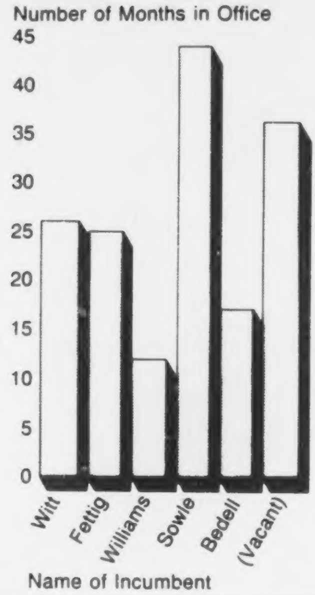


Source: Scorpio

Chart 3

GAO

OFPP Administration (Length of Term)



GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
WASHINGTON, D.C. 20301-1600

3 1 MAR 1988

Honorable George Bush
President of the Senate
Washington, DC 20515

Dear Mr. President:

Forwarded herewith are drafts of proposed legislation, "To amend certain laws and to enact certain new legislation for the purpose of facilitating and simplifying the Acquisition Programs of the Department of Defense (DoD)."

Purpose of the Legislation

The proposed legislation would:

- Revise section 908 of PL 99-500, "Requirements Relating to Undefinitized Contractual Actions (UCAs)," to delete certain limitations and reporting requirements. ATTACHMENT 1

- Provide for competitive prototyping for subsystems where cost effective and revises reporting content requirements supporting decisions on using competitive prototyping. (10 U.S.C. 2365) ATTACHMENT 2

- Increase from three years to ten years the period allowed for Government review of contractor technical data and for Government challenges of contractor restrictions on the right to use such data for competitive reprocurements. This change would provide for a more realistic time frame within which to perform meaningful reviews of contractor technical data and to challenge contractor restrictions. (10 U.S.C. 2321(a) through (d)) ATTACHMENT 3

- Authorize the negotiation of subcontract plans, applicable to the corporation as a whole or to one or more of its divisions or operating segments, rather than the negotiation of individual contract subcontract plans. This change would significantly reduce administrative lead time and costs. (Section (8)(d) of the Small Business Act) ATTACHMENT 4

- Eliminate referral to the Small Business Administration for Certificates of Competency when the next lowest responsive, responsible offeror is a small business or when the procurement is a small purchase as defined in the applicable statutes. These changes would significantly reduce administrative lead time and costs. (Section 8 of the Small Business Act) ATTACHMENT 5

Cost and Budget Data

The cost and budget implications of these initiatives cannot be determined at this time because the proposals involve administrative changes (e.g., the lowering of Congressionally- mandated authority levels) or other modifications for which there is no valid or meaningful method for predicting savings. Nevertheless, these initiatives will streamline and significantly simplify Defense acquisition and, therefore, should be enacted.

The Office of Management and Budget has advised that the proposal to enhance commercial-style buying practices is consistent with the Administration's objectives and that from the standpoint of the Administration's program, there is no objection to the presentation of the remaining proposals for consideration by the Congress. It is recommended that these proposals be enacted by the Congress.

Sincerely,

Kathleen A. Buck

Kathleen A. Buck

Attachments

ATTACHMENT---1

A BILL

To eliminate certain limitations and reporting requirements for undefinitized contractual actions.

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, that section 908 of the Department of Defense Appropriation Act, 1987 (Pub. L. No. 99-500, Oct. 18, 1986) is amended by deleting subparagraphs (C),(D), and (E) of subsection (a)(4).

ATTACHMENT---1

SECTION BY SECTION ANALYSIS

This Bill deletes the limitations and reporting requirements for undefinitized contractual actions for the period of October 1, 1987 through March 31, 1989.

ATTACHMENT---2

A BILL

To amend section 2365 of title 10, United States Code, to require that competitive prototype strategies be used when cost effective.

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, that:

(a) Subsection 2365(c)(1)(B) of title 10, United States Code, is deleted in its entirety and the following substituted therefor:

"(B) a report that fully explains why the use of such a strategy is not practicable.".

(b) Subsection 2365(d)(3) of title 10, United States Code, is deleted in its entirety and the following substituted therefore:

The term "subsystem of such system,' for purposes of the requirement of this section to use a competitive prototype strategy, means a collection of components (such as the propulsion system, avionics, or weapons controls) for which the prime contractors, major subcontractors,or government entities have responsibility for system integration and for which the Secretary of Defense determines that a competitive prototype strategy would be cost effective."

ATTACHMENT---2

SECTION BY SECTION ANALYSIS

Subsection (a) of the proposed legislation amends section 2365(c) to revise the reporting content requirements supporting decisions on using competitive prototyping.

Subsection (b) of the proposed legislation amends section 2365(d) to require the use of competitive prototype strategies when cost effective.

A BILL

To amend section 2321 of title 10, United States Code, to permit the Department of Defense to review and to challenge a use or release restriction asserted with respect to technical data by a contractor or subcontractor at any tier under a contract during a ten year period of time subsequent to final payment on the contract.

Be it enacted by the Senate and the House of Representatives of the the United States of America in Congress assembled, that section 2321 of title 10, United States Code, is amended as follows:

(a) by deleting paragraph (c)(2) in its entirety and substituting the following in lieu thereof:

"(c)(2) The review of an asserted use or release restriction under paragraph (1) shall be conducted before the end of the ten-year period beginning on the the date on which final payment was made on the contract under which the technical data is required to be delivered.".

(b) by deleting the words "three-year" in paragraph (d)(2)(A) and inserting "ten-year" in lieu thereof.

(c) by deleting paragraph (d)(2)(B) in its entirety and substituting the following in lieu thereof:

"(d)(2)(B) The ten-year period referred to in paragraph (A) is the ten-year period beginning on the the date on which final payment was made on the contract under which the technical data is required to be delivered.".

(d) by deleting the words "three-year" in paragraph (d)(4) and inserting "ten-year" in lieu thereof.

ATTACHMENT---3

SECTION BY SECTION ANALYSIS

The change to section 2321 (c)(2) increases the time frame for review and challenge of contractor's assertions of a proprietary right from a three-year to a ten-year period thereby permitting the Department of Defense to effectively challenge restrictions with the currently available personnel resources. The change also establishes final payment as the single commencement point for the start of the ten year period in which reviews are to be conducted.

The change to Section 2321 (d) increases the time frame for the review and challenge of contractor's assertions of a proprietary right from a three-year to a ten-year period thereby permitting the Department of Defense to effectively challenge restrictions within available personnel resources.

ATTACHMENT---4

A BILL

To amend section 8(d) of the Small Business Act [15 U.S.C. 637] to authorize a Federal agency to negotiate subcontract plans that are applicable to the corporation or one or more of its divisions or operating segments.

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, that section 8(d) of the Small Business Act [15 U.S.C. 637(d)] is amended by adding the following subsection:

> "(12) A Federal agency may negotiate subcontract plans incorporating the information prescribed in paragraph (6) that are applicable to the corporation as a whole or to one or more of its divisions or operating segments. Such subcontract plans may be included in and made a material part of any contract to meet the requirements of subsections 8(d)(4)(B) and 8(d)(5)(B).".

ATTACHMENT---4

SECTION BY SECTION ANALYSIS

The proposed change to the Small Business Act would authorize a Federal agency to negotiate subcontract plans for a corporation or one or more of its divisions or operating segments.

ATTACHMENT—5

A BILL

To amend the Small Business Act to eliminate the requirement for Certificate of Competency referral when the next lowest responsive, responsible offeror is a small business or when the proposed contract is a small purchase.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that section 8 of the Small Business Act [15 U.S.C. 637(b)] is amended by striking out the last sentence of subparagraph (b)(7)(C) and inserting in lieu thereof the following:

> "A contracting officer shall not be required to refer determinations of nonresponsibility to the Administration when the next low responsive, responsible offeror is a small business concern or when the proposed contract is a small purchase as defined in section 2304(g)(2) of title 10, United States Code, for the agencies listed in section 2303 of title 10, United States Code or section 302(g)(2) of the Federal Property and Administrative Services Act [41 U.S.C. 253] for executive agencies other than those listed in section 2303 of title 10, United States Code. Nothing in this paragraph shall require the processing of an application for certification if the small business concern to which the referral pertains declines to have the application processed.".

ATTACHMENT---5

SECTION BY SECTION ANALYSIS

The purpose of this bill is to amend section 8 of the Small Business Act [15 U.S.C.637] to exempt determinations of nonresponsibility from the requirement for Certificate of Competency (CoC) referrals to the Small Business Administration (SBA) when the next lowest responsive, responsible offeror is a small business or where the purchase is a small purchase as defined in the applicable statutes. This would expedite the award process without adversely affecting the goal of assuring that a fair proportion of contract awards are made to small business firms.

PROCUREMENT ROUND TABLE
1350 New York Ave. N.W., Suite 615
Washington, D.C. 20005
(202) 393-1780

Officers
Elmer B. Staats
Chairman
John F. Magnotti Jr
Secretary
Robert C. Moot
Treasurer

Directors
Dale R. Babione
Paul G. Dembling
J. Ronald Fox
Jacques S. Gansler
O.S. Hiestand
Paul R. Ignatius
Lawrence J. Korb
Robert T. Marsh
Thomas D. Morris
Ralph C. Nash Jr
Frederick Neuman
Philip A. Odeen
Frank Sanders
Barry J. Shillito
Donald E. Sowle
Robert F. Trimble
David Westermann
Hugh E. Witt

March 5, 1987

Dear Colleague:

The Procurement Round Table (PRT) is a non-profit corporation whose purpose is to inform the public and the Congress about the federal procurement process, to study and report on procurement issues, and to make recommendations for improvement to the federal procurement system. The members of the PRT Board of Directors, who serve pro bono and are private citizens, have extensive experience and background in a wide range of Federal Government procurement areas.

In 1972, the Congressional Commission on Government Procurement issued a four-volume report culminating nearly three years of intensive study of federal procurement. The study was made jointly by government, industry and academia. The first of 149 recommendations made by the Commission was to establish a statutory Office of Federal Procurement Policy in the Executive Office of the President with responsibilities as briefly outlined in the attached paper.

OFPP will again be considered for reauthorization this year. The PRT believes that the OFPP should be reauthorized and strengthened as discussed in the attached. We recommend full support of those who are interested in efficient and effective federal procurement.

Sincerely,

Elmer B. Staats

Elmer B. Staats
Former Comptroller General
and Chairman
The Procurement Round Table

Attachment

PROCUREMENT ROUND TABLE
POSITION ON THE REAUTHORIZATION OF THE OFFICE OF FEDERAL PROCUREMENT POLICY

Background

The Office of Federal Procurement Policy (OFPP) was established in Fiscal Year 1975 by Public Law 93-400. In the last 12 years, OFPP has been headed by five different administrators: Hugh Witt, Lester Fettig, Karen Hastie Williams, Donald Sowle, and, currently, Robert Bedell. During this time, the emphasis and direction of OFPP has varied depending on the backgrounds and interests of the individual administrators and the support they have received from the President, Congress, and the top management of the Office of Management and Budget (OMB) and the cooperation of the executive agencies. As chartered, OFPP was to provide leadership in several areas, including:

- Uniform government-wide procurement regulations.
- A Uniform Federal Procurement System.
- The formulation of executive branch positions on legislation.
- A Federal Procurement Data System.
- A Federal Acquisition Institute.
- Effective and timely solicitation of viewpoints on proposed policies, regulations, procedures and forms.
- Standard contract forms and language.
- Implementation of the recommendations of the Commission on Government Procurement.

Over the years, OFPP's performance has varied depending on the interest and support of the President, the top management of OMB and the Congress. This support has been of uneven quality. Within the present administration, we have witnessed wide extremes. During President Reagan's first term, OFPP reached a peak of effectiveness, showing great vigor and imagination with heavy participation by agency officials on a group of Work Groups formed by an executive committee of procurement executives. President Reagan issued a landmark executive order (E.O. 12352) implementing the goals of the Uniform Federal Procurement System. However, within the past two years, the management of OMB has made an effort to dismantle OFPP, allowing its staffing to deteriorate seriously and leaving the position of Administrator vacant for over 18 months. Today, there is an announced intent to support a statutory OFPP, and steps are being taken to rebuild the seriously reduced staff.

Position

The Procurement Round Table strongly supports the reauthorization of the Office of Federal Procurement Policy (OFPP) under the conditions which are outlined below.

OFPP should receive strong support from the President, the Congress, and the Director of OMB.

> The Administrator of OFPP, while a Presidential appointee, cannot command the attention of the heads of the agencies with procurement authority and operate effectively unless it is clear that the Administrator has strong support from the President and the Director of OMB. Support from the Congress is also essential.

OFPP should coordinate the establishment of the administration's position on legislation relating to procurement.

> There is need for a single focal point which coordinates the establishment of the executive branch's position on procurement legislation. Currently, it is not unusual for executive branch agencies to take different positions on procurement legislation, or even for departments within the Department of Defense to take contrary positions. OFPP should be, in coordination with OMB, the overall leader and the coordinator for the establishment of the administration's position on procurement legislation.

OFPP should play a much stronger leadership role in ensuring consistency and effectiveness in implementing procurement policies among government agencies.

> OFPP should assume a greater leadership role in managing the development and timely publishing of the Federal Acquisition Regulation. OFPP should perform more follow-up activity on agency implementation of executive branch policies to ensure compliance and consistent application of such policies. This should include the development of standards and criteria for uniform procurement systems. OFPP should monitor

implementation, both of systems and of policies, offer counsel and advice and bring inconsistent practices to the attention of the head of the agency.

OFPP should be properly staffed at the appropriate grade levels and numbers to obtain seasoned senior procurement personnel.

The size, quality and experience of the OFPP staff have declined in recent years. OFPP cannot perform the responsibilities assigned to it and be viewed as a leader in the procurement arena unless it has a capable staff to provide that leadership. This is a further indication of the need for OMB top management support for this function.

Consideration should be given to providing OFPP a more active role in the budget review process in order to strengthen its influence over the design and execution of the acquisition systems and the policies of the executive branch agencies.

OMB traditionally has exercised most of its authorities through the budget review process. OFPP could significantly strengthen its influence over the design and execution of the acquisition systems and policies of the executive branch agencies if it were regularly given the opportunity to participate in the budget review process similar to other management organizations contained within the umbrella of OMB. This type of approach would improve OFPP's role as a participant in the OMB management process, offering it more opportunity to support both OMB and the executive branch agencies.

Upgrade the status of the OFPP Administrator to Executive Level III.

To make the status of Administrator of OFPP strong and clear in the executive branch hierarchy, it should be upgraded to Executive Level III.

PROCUREMENT ROUND TABLE
POSITION ON THE REAUTHORIZATION OF THE
OFFICE OF FEDERAL PROCUREMENT POLICY

Conclusion

The Procurement Round Table would like to see a strong OFPP reauthorized by the Congress with the tools necessary for it to perform effectively the functions prescribed in the original legislation, P.L. 93-400, which authorized its existence.

March 5, 1987

PROCUREMENT ROUND TABLE
1350 New York Ave. N.W., Suite 615
Washington, D.C. 20005
(202) 393-1780

Officers
Elmer B. Staats
Chairman
John F. Magnoth Jr
Secretary
Robert C. Moot
Treasurer

Directors
Dale R. Babione
Paul G. Dembling
J. Ronald Fox
Jacques S. Gansler
O.S. Hiestand
Paul R. Ignatius
Lawrence J. Korb
Robert T. Marsh
Thomas D. Morris
Ralph C. Nash Jr.
Frederick Neuman
Philip A. Odeen
Frank Sanders
Barry J. Shillito
Donald E. Sowle
Robert F. Trimble
David Westermann
Hugh E. Witt

January 2, 1987

Dear Colleague:

The Procurement Round Table is a voluntary, nonprofit group of individuals who have had extensive experience in government procurement. The PRT issues position papers from time to time, encourages articles on significant issues by its members or others, and comments on pending legislation and current procurement issues.

When the Cost Accounting Board was dissolved in 1980, the federal acquisition community lost its means of obtaining waivers and exemptions and making needed changes to existing standards and requirements. Efforts since that time to pass legislation assigning these responsibilities to a particular agency or activity of government have not been successful.

The PRT believes that the enclosed article with its recommendations for resolving the problems surrounding the Cost Accounting Standards Board is a useful examination of this question, and recommends its careful consideration by all who are interested in defense procurement.

Sincerely,

Elmer B. Staats

Elmer B. Staats
Former Comptroller General
and Chairman,
The Procurement Round Table

Enclosure

(Note: This article was published in the MILITARY BUSINESS REVIEW issue November/December 1986)

A PROCUREMENT ROUND TABLE POSITION PAPER

COST ACCOUNTING STANDARDS BOARD

ISSUES RELATING TO ESTABLISHMENT OF A NEW BOARD

PURPOSE

This paper sets forth facts and views relative to a Cost Accounting Standards Board that operated during the 1970-1980 time period; problems resulting from the discontinuance of that board; and recommendations regarding a new board.

BACKGROUND

A Cost Accounting Standards (CAS) Board was established in 1970 by legislation amending the Defense Production Act., Pub. L. 92-379. The Board was comprised of five members, the Comptroller General and four members appointed by him, and was deemed by statute to be "an agent of the Congress" and "independent of the executive departments." 50 U.S.C. App. Section 2168(a).

The CAS Board was active until the end of fiscal year 1980, when it failed to receive an appropriation from the Congress. Thus, while the provision establishing the CAS Board and setting forth its authority is still part of Federal law, the Board itself has not been in existence for almost six years.

Nineteen cost accounting standards were developed and promulgated by the Board and remain in effect. Although at the time these standards were being written, there was considerable resistence to the requirement that contractors adopt and use the standards as a condition for contract award, today most contractors see value in their use. Such matters as disclosure of accounting systems, consistency in application of accounting procedures, and uniformity of treatment of elements of cost have been of value in the contracting process. Further, and to the credit of the Board, there is no evidence that their decisions were driven by the objective of obtaining short term savings for the Government at the expense of good accounting practices.

Controversy regarding constitutional and legal matters pertaining to the Board, its organizational placement, the standards, and to the authority of the Department of Defense (DOD) to change or write new standards has had a more continuous, long term relevancy than the initial industry resistance to accepting accounting changes. Several of these issues have gone to the Federal courts and to the Armed Services Board of Contract Appeals for resolution. The general conclusions derived from these cases is that actions of the Board were in accordance with Congressional desires and that the resultant standards are enforceable in Federal contracts. However, the Supreme Court's decision on "Gramm-Rudman-Hollings" casts doubt on the constitutionality of future actions that might be taken by a reestablished CAS Board with the Comptroller General as Chairman and members appointed by him.

PROBLEMS

When the CAS Board was dissolved in 1980, the Federal acquisition community lost its means of obtaining waivers and exemptions and making needed changes to existing standards and requirements. Efforts since that time to pass legislation assigning these responsibilities to a particular agency or activity of Government have not been successful.

In 1983, acceding to operational pressures to find a solution to waiver/exemption/update problems, DOD asked the Department of Justice (DOJ) to rule on the legality of its exercising such authority. The DOD specifically did not wish to risk legal challenge of contracts awarded where it had granted waivers/exemptions. DOJ decided that DOD had such authority.

Early in 1984, DOD announced that the Defense Acquisition Regulation Council and the Civilian Agency Acquisition Council ". . . have sufficient authority to amend, rescind, or waive the existing standards and to promulgate new standards. The Federal Acquisition Regulations can be amended to incorporate whatever cost accounting standards may be deemed necessary without creating a new, albeit small, federal agency."

Concern over this assumption of authority by DOD has been widespread. Mr. Charles Bowsher, the present Comptroller General, stated in 1984 before a Congressional committee:

> "Our first concern is with the independence of a board located in the DOD. Independence was a primary feature sought by the Congress when it established the Cost Accounting Standards Board in 1970. We believe that it continues to be very important to insulate the responsibility for establishing, interpreting and updating the Standards from the influences associated with the procurement process. Satisfying the need for independence within an agency like DOD, with the largest procurement budget in the federal government, is problematic."

The Financial Executives Institute and other industry associations also have questioned placement of these functions in the DOD. There is a generally held belief in the private sector that an organizational conflict of interest, as well as a lack of professional qualification to handle CAS issues, would occur if these important functions were absorbed within the existing DOD regulatory councils. Cost principles have become so complex that a full-time staff of highly qualified professionals is needed. DOD is using persons assigned on a part-time basis, and the principal Council representatives are procurement generalists -- not experts in cost accounting.

In addition, it is generally agreed, especially after the recent court decisions referred to above, that a new CAS Board should not be reestablished under the Comptroller General.

The ancillary issue of allowability has also been raised. It is believed by some that cost allowability and reasonableness are closely aligned with cost allocability (cost standards) matters. There appears to be merit in grouping the study, considerations, and authority for all such matters in one organization. Such an organization would overcome the conflicting and often conceptually different approaches which create confusion and uncertainty, and enhance the potential for abuse -- apparent or otherwise. Adequately staffed, it would be a logical source of cost rules on allowability that would be generally accepted as fair and reasonable, but as importantly, that would be clear and intelligible.

RECOMMENDATIONS

The following recommendations, if adopted, would resolve the problems noted above:

1. A new CAS Board should be created.
2. The Board should be located in the executive branch independent of the procuring agencies and insulated from "political" pressure for short term and parochial interests.

3. The Board should be given authority to adopt rules, regulations and standards on all matters of cost principles of costs charged to Federal contracts.

4. The Board should be composed of five members to be appointed by the President with the advice and consent of the Senate. They should represent government and industry, and the contracting and accounting professions. The President should designate a chairman from among the members.

5. A small, highly qualified staff of professionals should be provided for research and consultation as required by the Board.

6. The Board should be required to solicit public comment with regard to any proposed rule, regulation, or standard and to give appropriate consideration to such comment.

7. The Board should be required to engage in a rigorous examination of the cost/benefit relationship of all standards before they are issued.

PRT is a nonprofit corporation whose primary purpose is to inform the public about the federal procurement process and make recommendations for improving it.

Attachment C

Procurement Round Table Statements on a Regularized Profit Reporting System for Application to Department of Defense Negotiated Contracts and Major Contracts of Other Federal Agencies

PROCUREMENT ROUND TABLE
1350 New York Ave. N.W., Suite 615
Washington D.C. 20005
(202) 393-1780

Officers
Elmer B. Staats
Chairman
John F. Magnotti Jr
Secretary
Robert C. Mo
Treasurer

Directors
Dale R. Babione
Paul G. Dembling
J. Ronald Fox
Jacques S. Gansler
O.S. Hiestand
Paul R. Ignatius
Lawrence J. Korb
Robert T. Marsh
Thomas D. Morris
Ralph C. Nash Jr
Frederick Neuman
Philip A. Odeen
Frank Sanders
Barry J Shillito
Donald E. Sowle
Robert F. Trimble
David Westermann
Hugh E. Witt

March 10, 1987

The Honorable Charles A. Bowsher
Comptroller General of the United States
United States General Accounting Office
Washington, D.C. 20548

Dear Chuck:

The Procurement Round Table has reviewed the exposure draft entitled "A Proposal for a Program to Study the Profitability of Government Contractors." The draft plan would establish by statute an organization and process for gathering and studying contractor profitability on a regular and consistent basis. For that purpose, the plan would require "companies receiving awards or payments from the federal government on negotiated contracts totalling $50 million or more in one year" to submit financial data at the segment level. The plan defines the data to be obtained as follows: "Companies will report segment data separately for negotiated cost reimbursable contracts and negotiated fixed price contracts where cost or pricing data were supplied." This would cover about 67 percent of total prime contract dollar awards for 1985. It is essentially the universe of awards covered by other than sealed bids.*

As you know, the Procurement Round Table has taken a firm position on certain aspects of this matter. (See our letter of April 23, 1986, attached.) We strongly reaffirm the importance of a program of regular reviews and research into profit policies for application to the Department of Defense's negotiated contracts, as well as major contracts of other Federal agencies.

The objective would be periodically to improve profit policies to assure their fairness to government and to industry, to maintain the confidentiality of proprietary financial data, and to gain the incentive effect that profits provide for major systems contracts. A program of review and research should be based upon mutual, constructive participation by both industry and government.

---

*Wherever the term "negotiated" appears in this letter, it is intended to refer to the universe of awards covered by other than sealed bids.

While we strongly support periodic comparisons of profitability, we do not believe that federal profit policy should be determined solely by commercial profits, since many other important factors may be involved. As one of our members puts it: "For example, the radical changes that have occurred over the recent years in the oil/gas industry profitability provide no basis for increasing or decreasing profit on federal contracts." Additionally, as noted, care should be taken to preserve the confidentiality of proprietary financial data, and to avoid the disclosure of commercial data as a condition for obtaining government contracts.

In summary, the GAO's assessment of DoD's Defense Financial and Investment Review and DoD's response to that assessment indicate such sharp and significant unresolved differences in approach, methodology and conclusions that we believe that any Congressional directive at this time should be limited to a requirement that the President submit a plan within one year to regularize the collection and analysis of data on defense negotiated contracts (the universe you envision) based upon the DFAIR experience, previous studies, and the recent GAO analysis of the DFAIR report.

The principal issues and questions that we believe should be addressed in such a plan are as follows:

1. What are the most appropriate measures of contractor profitability at the segment and firm level, and what elements should be included in the numerators and denominators of the applicable ratios?

2. What is the most appropriate standard against which to evaluate the adequacy of industry profits, particularly the defense industry?

3. Is it desirable to adjust or modify data in order to secure compatibility of results between major government contractors and commercial operations?

4. What are the most appropriate measures of economic risk, and by what standards should risk be evaluated?

5. How frequently should profit reviews be conducted and what reporting channel provides the best combination of operational knowledge and analytical expertise by an objective professional organization?

6. How should industries be classified in order to recognize inherent differences among the various types of firms and segments within the firms?

7. Should profit reporting requirements address key policy objectives, such as:

   a. Optimum cost/value in product and/or service.
   b. Modernization of the industrial base.
   c. Viability of the industrial mobilization base.
   d. Adequate competition for major contracts.
   e. Selection of the best managed firms.

8. Will the Department of Defense experience provide the basis for guidance by the Office of Federal Procurement Policy in establishing a government-wide profit policy for all federal agencies?

9. Finally, what is the best basis for development of profit objectives and evaluating profitability of non-capital intensive firms? A discussion paper on this matter prepared by one of our members is attached.

We believe that the Department of Defense can most efficiently continue to be responsible for the collection and analysis of data on its contractors, using an independent entity for data accumulation that can assure its confidentiality. Further, we believe that the application of profit policies in each agency must remain the responsibility of the agency head, as now provided in the Federal Acquisition Regulation, subject to review and coordination by the Office of Federal Procurement Policy.

In summary, the Procurement Round Table believes that answers to the above questions should be developed prior to the initiation of a mandated, periodic profit reporting system. We believe that a joint work group appointed by the President and the Comptroller General should be assigned to develop responses to these issues.

We continue to believe such a system to be in the public interest provided the data to be reported are accepted as the most appropriate for the purpose, and the analytical methodology to be used is likewise viewed as sound and objective. We must not lose light of the fact that the end objective of periodic reporting and analysis is to conduct continuing research based upon solid analytical work, as emphasized in our letter of April 23, 1986, in order to assure that our profit policies provide effective rewards and incentives. The Procurement Round Table would be pleased to assist in any cooperative effort to develop such an approach.

Sincerely yours,

Elmer

Elmer B. Staats
Chairman

Attachments:

Letter of April 23, 1986, to Comptroller General Bowsher
Discussion paper entitled: "New DoD Profit Policy Adversely Affects Research and Development and Possibly National Security."

Copy to:

Senator Jeff Bingaman
Senator John Glenn
Senator Sam Nunn
Senator William Proxmire
Senator Dan Quayle
Senator William V. Roth, Jr.
Congressman Les Aspin
Congressman Jack Brooks
Congressman Frank Horton
The Honorable Robert Bedell
The Honorable Richard Godwin
The Honorable James Miller

PROCUREMENT ROUND TABLE
1101 North Highland Street, Suite 201
Arlington, Virginia 22201
(703) 524-[illegible]

Officers
Elmer B. Staats
Chairman
John F. Magnotti Jr
Secretary-Treasurer

Directors
Dale R. Babione
Paul G. Dembling
J. Ronald Fox
Jacques S. Gansler
O. S. Hiestand
Robert T. Marsh
Robert C. Moot
Thomas D. Morris
Ralph C. Nash Jr
Frederick Neuman
Frank Sanders
Barry J. Shillito
Donald E. Sowle
Robert F. Trimble
David Westermann
Hugh E. Witt

April 23, 1986

The Honorable Charles A. Bowsher
Comptroller General
of the United States

Dear Chuck:

The Procurement Round Table met on April 7 and, among other subjects, discussed the Defense Financial and Investment Review (DFAIR). While the PRT feels that DFAIR was effectively conducted, we believe that the time has come to place the conduct of such studies on a regular basis--instead of continuing to engage in ad hoc efforts at unplanned intervals.

Specifically, we recommend that an interval of three years be adopted. To accomplish this we urge that a regular procedure be put in place, drawing on the lessons of Profit '76 and DFAIR, and that an independent professional organization be utilized to assure:

--continuing expertise in data collection and analysis

--protecting the confidentiality of the data of individual companies, limiting the information reported both publicly and within government to summaries such as DFAIR has developed.

Other questions to be considered and answered are: (1) whether the reporting should apply only to contractors above a given threshold (such as $100 million per annum in contracts with all Federal agencies); and (2) whether such reporting should be authorized by law with provisions for protecting submitted contractor data from disclosure. Based on the DFAIR experience, these are two matters which we feel you will need to consider.

We also feel that continuing research into the area of government profit policy is highly desirable. Examples of ~~such~~ studies include consideration of tying profits to performance (versus cost); or tying profit appropriately to assets employed (as is done in some other countries); as well as other ideas. Such research will tie directly into the periodic data base described above.

Finally, we suggest that the Office of Federal Procurement Policy be designated as the government-wide focal point for coordinating data collection, and for assuring that government-wide policies are developed when needed, leaving the development of internal policies to the individual agencies.

We will look forward to reviewing your findings and recommendations on these matters, and stand ready to respond to any material you may wish us to review, or to comment on any issues you may wish to pose to us.

Sincerely,

Elmer

Elmer B. Staats
Chairman

NEW DEPARTMENT OF DEFENSE PROFIT POLICY ADVERSELY AFFECTS RESEARCH AND DEVELOPMENT AND POSSIBLY NATIONAL SECURITY

For various reasons over the past few decades, there has evolved a shift within the Department of Defense from internal research and technological services to a greater dependence on companies from the private sector. Many of these private companies have consequently become critically important to our national security interests and, in the minds of many people, have become one of our more important national resources. The economic viability of these research and development and technical service firms, practically all of whom use profit dollars to assist in meeting defense scientific/technical needs, is vital.

Research and development and technical services contractors are facing profit reductions of over 40 percent as a result of new guidelines recently published by the Department of Defense. Profit reduction of this magnitude will have a catastrophic impact on the profitability and economic viability of such firms.

Assuming the highly qualified research contractors are important and assuming that their profitability, in order to meet defense needs, is also important, the Department of Defense should immediately change the new profit policy which became effective October 18, 1986, in a manner that allows these firms to have an opportunity to realize a reasonable profit.

Section 9105 of the Defense Appropriations Act for fiscal year 1987 mandates that the Department of Defense use new profit policies after October 18th to "provide for increased emphasis on facilities...." The new Department of Defense policy will satisfy this requirement. But Congress did not intend that this new emphasis on facilities apply, in the manner it is being implemented, to professional and technical services firms. Specifically, the Conference Report on H.J. Res. 738 states:

> [Though] the language indicates that the policy should place increased emphasis on capital investment and risk, the conferees recognize that some types of firms, such as professional and technical services firms, doing business with the Department of Defense, inherently are called upon to make less capital investment and may participate in projects with less total risk. It is the conferees belief that, notwithstanding this modified emphasis, any profit policy must ensure that firms performing satisfactorily for the Department of Defense earn a reasonable profit.

In essence, it appears that the Department of Defense is not following the above congressional intent. Indeed, professional and technical services firms need less capital investment in "facilities." Excess investment in facilities is usually neither necessary nor desirable. The investment of the better-managed of such companies is in intangible assets: those involving the acquisition, development and retention of competent and complementary human resources. This inventory of talent is often much more important than facilities.

Both the congress and the Department of Defense set an objective of reducing profits by one percentage point. The Department of Defense policy will reduce the profit on labor-intensive contracts by about four percentage points. This action will result in profit levels too low to allow research and development and technical services contractors to meet the needs of the Department of Defense, and may even adversely affect national security. These firms, which provide the Department of Defense the opportunity to cultivate competition of ideas and new concepts, typically are not highly capitalized, and depend upon their profitability to help finance normal operations, research and development, and growth. Unlike many heavily facilitized companies, the vast majority of these firms have never been able to distribute a cash dividend as they go about meeting such needs. Without reasonable profit margins, the incentive for these kinds of companies to expend their resources to pursue research and development efforts for the Department of Defense would be lost. In a short time, the Department of Defense would begin to see a steady erosion of this important resource.

There are a number of uncertainties relative to the implementation of the new interim policy. First, there is a broad spectrum of contractors who require lesser capital investment. There is also no clear definition of the "technical services industry." Additionally, there is limited meaningful information available relative to this industry's overall and segmented profits. Finally, there is a great deal of uncertainty as to what will happen if this policy is implemented as outlined.

Before continuing on the course set by the interim profit policy as it relates to research and development and technical services contractors, the Department of Defense should consider the potential gain versus the potential loss. This industry represents such a small percentage of Department of Defense contractor profit dollars that no appreciable dent is made in the $700 million target profit reduction by overtaxing research and development and technical services contractors. On the other side of the coin, potential for damage to the industry from an unintentionally large reduction in profits is dramatic.

Recognizing that it is the expressed desire of the congress that defense-wide profits be reduced by about one percentage point, there are a few solutions to resolving this situation. For example

1) Push forward with the recommended General Accounting Office approach relative to better understanding the entire profitability of the various industries doing business with the government. It is important that compilation of this data be under an entity that can maintain its confidentiality.

2) Until analysis of more meaningful profit data can take place, use traditional profit guidelines when research and development or technical services are being acquired. (This approach has been used in the past by the Department of Defense) The resultant target profit could be reduced by 8 to 10 percent to achieve a one percentage point reduction in contract profits in this industry.

3) Until a better application of the impact of any change can be assessed, plan on a one percentage point reduction across the entire spectrum of defense industries. Once the profit study recommended by the General Accounting Office has been completed and the results assessed, there will be less risk of an unsound profit policy.

Draft for discussion prepared by a Director of the Procurement Round Table

February 4, 1987

AMERICAN BAR ASSOCIATION Section of Public Contract Law
Writer's Address and Telephone

1987-88

CHAIRMAN
C. Stanley Dees
1575 Eye Street, NW
Suite 800
Washington, DC 20005
202/789-7628
ABA/net ABA2141

CHAIRMAN-ELECT
Thomas J. Madden
1801 Pennsylvania Avenue, NW
Suite 1200
Washington, DC 20004
202/662-4303

VICE-CHAIRMAN
Donald G. Gavin
8230 Boone Boulevard
4th Floor
Vienna, VA 22180
703/790-8750

SECRETARY
Norman J. Roberts
360 North Crescent Drive
Beverly Hills, CA 90210-4867
213/859-5985

BUDGET AND FINANCE OFFICER
Donald J. Kinlin
2000 Courthouse Square
P. O. Box 1817
Dayton, OH 45401
513/226-4922

SECTION DELEGATE
Marshall J. Doke, Jr.
4300 Republic Bank Tower
Dallas, TX 75201
214/754-9413

IMMEDIATE AND PREVIOUS
PAST CHAIRMEN
Paul G. Dembling
1111 19th Street, NW
Suite 1000
Washington, DC 20036
202/463-2920
James J. Myers
One Post Office Square
Suite 3700
Boston, MA 02109
617/357-8700

COUNCIL MEMBERS
Donald P. Arnavas
1200 1[illegible] Street, NW
Washington, DC 20036
King K. Culp
1313 Production Road
Fort Wayne, IN 46808
Michael J. Ladino
1747 Pennsylvania Avenue, NW
Washington, DC 20006
Margaret E. McConnell
100 West Washington Street
Phoenix, AZ 85003
Thomas J. Patten
1333 New Hampshire Avenue, NW
Washington, DC 20036
John T. Sant
P. O. Box 516
St. Louis, MO 63166
Leonard Suchanek
18th & F Streets, NW
Washington, DC 20405
Norman R. Thorpe
Hq. AFLC/JA
Wright Patterson AFB, OH 45433
Karen Hastie Williams
1001 Pennsylvania Avenue, NW
Washington, DC 20004-2505

EDITOR, PUBLIC CONTRACT
LAW JOURNAL
Matthew S. Simchak
1001 22nd Street, NW
Washington, DC 20037

EDITOR, PUBLIC CONTRACT
NEWSLETTER
Martin J. Harty
9926 Rand Drive
Burke, VA 22015

BOARD OF GOVERNORS LIAISON
Edward L. Benoit
P. O. Box 366
Twin Falls, ID 83303-0366

YOUNG LAWYERS LIAISON
Mary Ellen Coster Williams
1728 Massachusetts Avenue, NW
Washington, DC 20036

LAW STUDENT LIAISON
Michael R. Hogan
2015 Huntington
Oklahoma City, OK 73116

SECTION ADMINISTRATOR
Marilyn Neforas
750 North Lake Shore Drive
Chicago, IL 60611
312/988-5596
ABA/net ABA290

1575 Eye Street, N.W.
Washington, D.C. 20005
(202) 789-7628
February 12, 1988

Honorable Lawton Chiles
Chairman
Subcommittee on Federal Spending,
Budget and Accounting
326 Dirksen Senate Office Building
Washington, D.C. 20510-6258

Re: Office of Federal Procurement Policy Act Amendments of 1987

Dear Senator Chiles:

The American Bar Association's Section of Public Contract Law ("Section") appreciates the opportunity to express its views concerning H.R. 3345 ("House Bill"), the Office of Federal Procurement Policy Act Amendments of 1987. Unless otherwise indicated herein, the views expressed are those of the Section. They have not been considered or adopted by the Association's Board of Governors or its House of Delegates and should not be construed as representing the position of the American Bar Association.

1. Reauthorization of the Office of Procurement Policy for a Four-year Period

As it has done in the past, the Section strongly endorses congressional reauthorization of the Office of Federal Procurement Policy ("OFPP") and recommends that at least a four-year extension be adopted. The need for OFPP is as great now as it was when last reauthorized in 1983. Centralized Executive Branch responsibility and leadership for developing procurement policies, reviewing regulations, and monitoring ongoing procurement operations, is essential to improving the efficiency and effectiveness of the government procurement process. Reauthorization of OFPP would provide this needed leadership by centralizing responsibility for procurement-related decisions in a body independent of the various contracting agencies.

2. OFPP Regulatory Authority

Section 3 of the House Bill restores the original 1974 regulatory authority to the Administrator of OFPP ("Administrator"). Under H.R. 3345, the roles of the Administrator and the Director of OMB are reversed and returned to the pre-1983 relationship. The Administrator can act with the concurrence of the OMB Director to deny or rescind government-wide regulations if the Administrator believes them to be inconsistent with the OFPP Act. Under current law, only the OMB Director has the authority to deny or rescind regulations, if the Administrator determines them to be inconsistent.

The Section strongly endorses both the return to the Administrator of the pre-1983 role and the restoration to OFPP of the full "regulatory" authority provided in the original 1974 authorization. The very nature and purpose of OFPP dictates that it have directive authority with respect to procurement policies, regulations, procedures, and forms used by Government contracting agencies. This does not mean that every agency and every contract must conform to a uniform requirement. OFPP must prescribe policies and requirements in a manner that accommodates legitimate differences in the types of products and services required or available to meet a particular agency's needs.

Additionally, in order to increase competition, governing regulations must be fair to all, and as simple and uniform as possible. Voluminous, conflicting, unnecessary and sometimes ambiguous procurement regulations discourage competition, foster contract disputes, and increase costs. Thus, procurement policies, regulations, procedures and forms should be scrutinized and controlled by a body such as OFPP that is independent of the agencies who enter into the contracts.

3. Establishment of a Single Federal Acquisition Regulatory Council and its Relationship to Existing Councils

Section 4 of the House Bill establishes a single Federal Acquisition Regulatory Council. However, the relationship between this "single council" and the two existing acquisition regulatory bodies, the Defense Acquisition Council and the Civilian Agency Acquisition Council, is not spelled out. Moreover, the vagueness and ambiguity of the proposed legislative language offer little guidance as to the intent of Congress in developing a "single council."

Without clarification, the single council might be interpreted to supplant the existing regulatory bodies and, in so doing, leave uncertain the legal status of their respective independent regulatory authority. It is unclear whether the single council would provide a mechanism for the Administrator to exercise his regulatory authority for non-conforming regulations or whether it is intended to provide absolute authority for the OFPP Administrator to overrule regulations issued by the two councils or other federal agencies. To the extent the House language would produce results that are inconsistent with the FAR, precedents provide that the FAR governs.

Alternatively, another interpretation might project the single council into a "coordinating role." Such a role would arguably not displace the regulatory responsibilities of the two existing councils. Rather, under this interpretation, the single council could become a forum for discussion and coordination among the representatives of DOD, GSA, NASA and OFPP on the procurement matters for which government-wide coordination is essential. For example, in 1987, a coordination mechanism might have been useful on issues such as data rights, prompt payment exemptions, and contracting out. A coordinating forum in which each agency representative maintained equal authority could expedite the issuance of regulatory modifications, help avoid conflicting supplements and begin the process of reducing the high volume of procurement regulations.

Absent clarification of the legislative intent behind the single council and a clear definition of: (1) the relationship of the single council to the existing regulatory councils and (2) the relationships among the participants on the single council, the Section cannot judge the merit of the current House proposal. However, the Section does fear that enactment of the House language, as is, without additional guidance, would lead to confusion, ambiguity and numerous legal and regulatory problems and would offset any positive contributions that might emerge from a single council.

4. Reestablishment of the Cost Accounting Standards Board

Section 5 of the House Bill establishes within OFPP a seven-member independent board known as the Cost Accounting Standards Board ("CAS Board" or "Board"). Chaired by the Administrator, the Board includes two members from the Federal Government, two from private industry and two from the accounting profession. The Congress intends for this Board to fill the void left by the expiration of the prior CAS Board authorization that existed between 1970 and 1980, albeit outside OFPP. The cost accounting standards adopted by the prior Board are still law today, but no organization retains jurisdiction to administer them.

The Section strongly supports the legislative establishment of a new CAS Board with the following comments:

- Locate CAS Board within the Executive Branch and, in particular, within OFPP. Placement of the Board within OFPP must be accompanied by increases in the staff of that office to ensure that this new responsibility can be met without an intolerable resource drain;

- Establish a reconstituted CAS Board with authority to promulgate new cost accounting standards, if necessary; to modify and grant exemptions and waivers from the previously established standards on cost allocability;

- Broaden scope of CAS Board authority to include responsibility for establishing standards and methods for determining cost allowability, but recognize policy authority of agency (at high Secretarial level) to establish which costs are allowable and to request CAS Board development of government-wide accounting standard to implement such policies;

- Recognize CAS Board authority to modify or change standards *prospectively* in response to other forces, *e.g.*, decisions of Boards of Contract Appeals, courts, industry initiatives, contracting officers' analyses;

- Modify CAS Board authority to exclude from the cost accounting standards negotiated contracts that are priced on the basis of adequate price competition;

- Reconsider composition, qualifications and additional governmental representation among CAS Board representatives in light of Board's jurisdiction over implementation of both procurement policy and cost accounting issues; and

- Adopt procedures for notice and public comment in connection with the promulgation of rules, regulations, cost accounting standards, cost principles and modifications by the CAS Board. Although promulgations of CAS Board are proposed to be exempt from judicial review under APA, this legislation should make clear that administrative due process is required. Moreover,

> judicial review is provided for contract disputes arising out of the application of the cost accounting standards under the Contract Disputes Act.

The Section's comments above detail the guidelines that any newly established CAS Board should follow.

5. Procurement Integrity

Since the Section is anxious to see the expedited reauthorization of OFPP, we are hesitant to address any issue in the House Bill that focuses on unrelated legislative matters. Section 6, entitled "Procurement Integrity", is one such section which detracts from the core legislative purpose of the Bill and is likely to sidetrack its consideration by the full House and the Senate. For this reason, we recommend that Section 6 be dropped.

However, in the event Congress decides to retain the Procurement Integrity section, several comments by the Section are appropriate. Section 6 sets out a broad-scoped statutory scheme to further control potential conflicts of interest on the part of certain government employees and contractor personnel who sell to the government. The restrictions would apply during all stages of the "conduct of any federal agency procurement of property or services." The Bill would make unlawful certain discussions or offers between Government employees and contractor representatives during the pre-award period.

Over the past three years, there have been a number of new statutory and regulatory provisions dealing with potential conflicts of interest. Indeed, the last three Defense Authorization Acts have included provisions focused on the relationships between Government employees and contractors. *See* P.L. 99-145; P.L. 99-661; P.L. 100-180. Moreover, these restrictions were in addition to the criminal provisions already found in Title 18 of the U.S. Code. Therefore, the Section believes that Section 6 of the Bill contains numerous features that are redundant and unnecessary.

Furthermore, the reach of the House proposal is very broad. It applies, during all phases of a procurement, to "any officer, employee or representative of any competing contractor" and to "any procurement official or employee of such agency personally or substantially involved in the procurement." The House Bill proscribes, for example, the receipt by covered officials or employees of anything of value from a "competing contractor." That term includes any business reasonably likely to submit a proposal. Thus, a Christmas gift to an engineer in a joint venture project could be deemed "unlawful" as that company might submit a competing proposal on another contract. Such a result is unwarranted.

Section 6 imposes yet another certification requirement. This new certification, a precondition to award of any contract for procurement of goods and services, requires the signing representative to state that he does not know or have reason to know of any violations of the Section 6 requirement. Certifications are also required from agency officers and employees, leading to the administrative nightmare of hundreds of certifications on a major systems procurement.

As the certification language is presently proposed, the certifying individual could be held liable for mere negligence. The language is so broad that enforcement might effectively foreclose any meaningful opportunity for a contractor to employ a covered official or employee. For this reason, if a standard is included, we recommend that the same standard used in the False Claims Act and the Program Fraud Civil Remedies Act be adopted, namely "knowingly"--actual knowledge or deliberate ignorance or reckless disregard of the truth.

Finally, Section 6 sets up a mandatory full-scale debarment mechanism to punish contractors who violate Section 6 requirements. The Bill does provide some due process protections in subsections (d)(2)(A) and (B) in connection with debarment proceedings arising from such violations. However, the agency is given no discretion to waive such a hearing if it is convinced that the contractor is presently responsible. Failure to permit this alternative relief appears to be directly at odds with Part 9 of the FAR. Moreover, denying such alternative relief will consume time and energy resources unnecessarily.

Furthermore, the Bill does not address procedural safeguards or even mention the suspension procedures. Presumably no hearing would be required prior to suspension of a contractor, as is the case under current law. This failure to provide due process prior to suspension should be corrected. Suspension procedures should include the same due process protection as debarment.

In sum, the debarment mechanism in Section 6 of the House Bill appears to duplicate remedies presently available to the Government without providing safeguards against the possibility of suspension without a hearing. The failure to provide such protection is abusive and very damaging to the procurement process.

Section 6 also mandates that the debarment hearings would be conducted by the Boards of Contract Appeals with appellate review by the Federal Circuit. While the Section of Public Contract Law recognizes that Boards of Contract Appeals ("BCAs") have generally not played a role in debarment proceedings, we note that several boards (GSBCA, HUD and Energy) have assumed additional judicial responsibilities. Consistent with the requirement for OFPP to review the BCA dockets and allocation of judges, it may be useful also to consider the jurisdiction of the BCAs within the FAR system.

Finally, under the House proposal, debarment would be employed as a punishment tool. Contracting officers who violate the requirements can be barred from serving in such capacity for the Federal Government. Contractor representatives can be fined. These provisions are clearly penal in nature. They are inconsistent with the focus of debarment proceedings, *i.e.*, determination of the contractor's present responsibility. Moreover, they fly directly in the face of the Packard Commission's recommendations against punitive use of the debarment process.

Serious consequences can result from an adverse finding. But there is no discretion left to the agency; it must initiate a Section 6 debarment proceeding. Substantial questions are raised as to whether the Constitution requires the use of an Article III court to impose such penalties.

In light of the many unanswered questions and problems identified, the Section believes that the provisions of Section 6 should not be enacted.

6. Architectural and Engineering Services

Section 8 of the House Bill amends the current definition of "architectural and engineering service" found in the Federal Property and Administrative Services Act. The Section has previously commented on the definition of architectural and engineering service when FAR Section 36.102 was amended several years ago. A copy of those comments are attached for your information.

Conclusion

The Section on Public Contract Law appreciates the opportunity to present its views to the Committee. We hope these comments will be of assistance in your consideration of this legislation. We would be happy to discuss these issues with you and your staff at your convenience.

Sincerely,

C. Stanley Dees

C. Stanley Dees
Chairman
Section of Public Contract Law

Enclosure

cc: The Honorable Warren Rudman
Council Members and Officers

American Bar Association

WRITER'S ADDRESS AND TELEPHONE

8230 Boone Blvd.
Suite 400
VA 22180
(703) 790-8750

ATTACHMENT

1984-85

CHAIRPERSON
Ruth C Burg
ASBCA Room 9569
200 Stovall Street
Alexandria VA 22332
202 325-9520

CHAIRMAN-ELECT
James J Myers
One Post Office Square
37th Floor
Boston MA 02109
617 357-8700

VICE-CHAIRMAN
Paul G Dembling
1111 19th Street NW
Suite 1000
Washington DC 20036
202/463-2800

SECRETARY
C Stanley Dees
1575 Eye Street NW
Suite 800
Washington DC 20005
202/789-7628

SECTION DELEGATE
Marshall J Doke Jr
4200 Republic Bank Tower
Dallas TX 75201
214/742-1021

IMMEDIATE AND PREVIOUS
PAST CHAIRMEN
Thomas E Abernathy IV
Suite 2800 Harris Tower
233 Peachtree Street NE
Atlanta GA 30043

Robert D Wallick
1250 Connecticut Avenue NW
Fifth Floor
Washington DC 20036

COUNCIL MEMBERS
Donald McL Davidson
One Union Square
Seattle WA 98171

Martin J Harty
9926 Rand Drive
Burke VA 22015

W Stanfield Johnson
1100 Connecticut Avenue NW
Washington DC 20036

Donald J Kinlin
Dept of the Air Force
AFLC/JAB
Wright-Patterson AFB OH 45433

Raphael Mur
Grumman Aerospace Corp
Mail Stop B02-05
Bethpage NY 11714

John S Pachter
8230 Boone Boulevard
Vienna VA 22180

Norman L Roberts
380 North Crescent Drive
Beverly Hills CA 91210

Patricia A Szervo
726 Jackson Place NW
Washington DC 20503

Prospere S Virden Jr
7900 Westpark Drive
McLean VA 22102

EDITOR PUBLIC CONTRACT
LAW JOURNAL
Matthew S Simchak
1001 22nd Street NW
Washington DC 20037

EDITOR PUBLIC CONTRACT
NEWSLETTER
Martin J Harty
9926 Rand Drive
Burke VA 22015

YOUNG LAWYERS DIVISION
REPRESENTATIVE
Alan C Brown
555 15th Street NW
Washington DC 20005

LAW STUDENT DIVISION
REPRESENTATIVE
Kathleen T Schwallie
3241 Overland
Los Angeles CA 90034

BOARD OF GOVERNORS
LIAISON
John H Neiman
1119 High Street
Des Moines IA 50309

SECTION ADMINISTRATOR
Marilyn Neforas
American Bar Association
750 North Lake Shore Drive
Chicago IL 60611
312/988-5596

May 8, 1985

Mr. Roger M. Schwartz
Director
FAR Secretariat (VT)
General Services Administration
18th & F Streets, N.W.
Room 4041
Washington, D.C. 20405

Re: FAR 36.102, Architect-Engineer
Services (Definition)
Far Case No. 85-20
(Fed. Reg. March 15, 1985,
p. 10516)

Gentlemen:

This letter is written on behalf of the Section of Public Contract Law of the American Bar Association pursuant to special authority extended by the Association's Board of Governors for comments by the Section on acquisition regulations. The views expressed are those of the Section and have not been considered or adopted by the Association's Board of Governors or its House of Delegates.

The following comment is submitted regarding the proposed definition of architect-engineering (A/E) services as published in the Federal Register of March 15, 1985.

On June 1, 1985, the Public Contract Law Section submitted comments to the Office of Federal Procurement Policy on a related question of the application of the Brooks Act to A/E activities other than those directly related to construction. That aspect of the question was resolved through issuance of OFPP Policy Letter 83-3, dated June 8, 1983, recognizing, on the basis of an interpretation by the General Accounting Office, that the Brooks Act applies to A/E services not necessarily related to construction.

SECTION OF PUBLIC CONTRACT LAW

The June 1, 1982 comment of the Public Contract Law Section included a recommendation for a definition of A/E services that would clarify the application of the Brooks Act to non-construction A/E activities by reference to those services that involve studies, reports, investigations and similar services requiring engineering or architectural expertise. We reaffirm our support for that earlier recommendation.

The definition now proposed in FAR 36.102 falls short in that regard and will leave a "gray area" for interpretation by agencies without any clear guidelines. Part (a) of the proposed definition is in line with subsection (1) of the Public Contract Law Section's proposed definition (attached) except that it would be desirable to remove a possible ambiguity by making specific reference to state law.

We recommend that Part (b) be substantially revised along the lines of the Public Contract Law Section's subsection (3). This suggested language would provide meaningful policy direction to the agency program representatives. The agency would still retain the flexibility to determine the application of the law on a case-by-case basis, but would have the advantage of providing guidelines for the contracting officer. The experience over the past ten years since enactment of the Brooks Act indicates that the "incidental" reference alone is not sufficient to provide a sound basis for decision.

Your consideration of these comments is appreciated.

Sincerely,

John S. Pachter
Chairman
Federal Acquisition Regulation
Coordinating Council

JSP15:30/vhv
Enclosure

RECEIVED
MAY 15 1985
[illegible]ELL & MORING

A/E DEFINITION

Public Contract Law Section
American Bar Association

RECOMMENDATION

The American Bar Association's Public Contract Law Section recommends a redefinition of A/E services in FAR 36.102 (FAR Case No. 85-20) as follows:

"Architect-engineer services" means:

(1) Professional services as defined in applicable state laws which are required to be performed or approved by a licensed architect or engineer, or

(2) Professional services of an architectural, or engineering nature associated with research, development, design, construction, alteration, or repair of real property, or

(3) Such other professional services which uniquely or to a substantial or dominant extent logically require performance by a professionally licensed and qualified architect or engineer, as well as incidental services that members of these professions and those in their employ may logically and justifiably perform, including studies, reports, investigations, and similar services which require engineering or architectural expertise.

As used herein, "state" means the 50 States, the District of Columbia, and the territories and possessions of the United States.

JSP15:31/vhv

PRESS RELEASE

THE VICE PRESIDENT
OFFICE OF THE PRESS SECRETARY

FOR IMMEDIATE RELEASE
Wednesday, March 23, 1988

CONTACT: 202/456-6772

SUMMARY OF PRESIDENTIAL TASK FORCE MEETING
WASHINGTON, D. C.
MARCH 22, 1988

Vice President George Bush, Chairman of the Presidential Task Force on Regulatory Relief, yesterday instructed heads of concerned federal agencies to redouble their efforts to conclude their unfinished business this year. The Vice President also received a report on the Task Force's ongoing oversight of defense procurement reform pursuant to the recommendations of the Packard Commission.

Among items discussed for renewed attention were the deregulation of natural gas; revisions of Davis-Bacon requirements to lower costs in the defense budget and other federally financed construction programs; relaxation of the CAFE standards; and deregulation initiatives of federal agencies that are behind scheduled commitments.

- Deregulation of Natural Gas: "This has been an Administration priority from day one," the Vice President said. Adding that the Administration had achieved partial deregulation with repeal of the Fuel Use Act he said that it was time to complete the task especially with oil prices at relatively low levels. Beryl Sprinkel, Chairman of the Council of Economic Advisers, added that the United States had ample supply of natural gas which, if fully deregulated, could displace growing oil imports.

- Davis-Bacon Act: The Davis-Bacon Act, also discussed at the meeting, covers any federal or federally assisted contract in excess of $2,000, a limit that has not changed since 1935. The Administration's proposal would raise the threshold to $1 million for defense contracts and $100,000 for other agencies. The Administration has also proposed similar changes in the Service Contract Act. These two legislative proposals would save almost $500 million annually.

- Florida Demonstration Project: The Vice President also approved the expansion of a five agency experiment, called the Florida Demonstration Project, that is reducing the paperwork burden imposed on university researchers by Federal, State and university rules when Federal funds are involved.

-more-

> Because of its success so far, the Project will expand, beginning October 1, 1988, to include research contracts as well as grants, and to include universities and research facilities outside of Florida. The Project will enable researchers to spend more time on research and less on filling out forms.

With respect to the Task Force's ongoing oversight of defense procurement reform, the Vice President received a report from the Office of Federal Procurement Policy on the successful implementation of a process for OMB review of procurement regulations patterned after the regulatory review process established by the Task Force pursuant to Executive Order 12291, signed by the President, February 1981.

With respect to the procurement paperwork reduction program, almost 200 procurement and paperwork regulations have been reviewed in the first year of the program with changes made to almost half of them. The program implements several of the reforms recommended by the Packard Commission to simplify and deregulate the Federal procurement system which it found was seriously overregulated and inefficient. As part of that program, Federal agencies were instructed to reduce regulations that duplicate or complicate matters contained in government-wide regulations.

The Task Force also announced the Fiscal Year 1988 goals to examine meeting Government needs for commercial services by contracting with private businesses if the costs are lower than meeting those needs with Government employees. As a result of an Executive Order issued by the President last year, almost $250 million, accounting for almost 25,000 positions, would be saved. This reflects a savings of 30% for each position studied. The Task Force will continue to monitor agency progress in meeting the goals set by the President.

######

Statement of
The Associated General Contractors of America
Presented to the
Subcommittee on Federal Spending, Budget and Accounting
of the
Committee on Governmental Affairs
United States Senate
on the Subject of
Reauthorization of the Office of Federal Procurement Policy
March 25, 1988

AGC is:

- More than 32,500 firms including 8,000 of America's leading general contracting firms responsible for the employment of 3,500,000-plus employees;
- 104 chapters nationwide;
- More than 80% of America's contract construction of commercial buildings, highways, industrial and municipal-utilities facilities.

The Associated General Contractors of America represents more than 32,500 firms including 8,000 of America's leading construction companies. These general contractors employ more than 3,500,000 workers, and perform more than 80% of America's contract construction of commercial buildings, highways, industrial and municipal-utilities facilities.

AGC Supports the Reauthorization of OFPP

The Associated General Contractors of America (AGC) supports the reauthorization of the Office of Federal Procurement Policy (OFPP). The reauthorization of OFPP is necessary to continue to stimulate change in outdated or unworkable procurement statutes and regulations which are complex, inconsistent and burdensome to the procurement process, and which eventually work to the detriment of the taxpaying public.

The Commission on Government Procurement recommended in 1969 that an Office of Federal Procurement Policy be established to provide leadership in the development of government-wide procurement policies. In response to the Commission's recommendations, Congress enacted Public Law 93-400, The Office of Federal Procurement Policy Act. This 1974 law established OFPP as a part of the Office of Management and Budget (OMB), with an initial authorization of five years, to provide "...overall direction of procurement policies, regulations, procedures and forms for executive agencies..." Public Law 96-83, The Office of Federal Procurement Policy Act Amendments of 1979 reauthorized OFPP for an additional four years until October 1983. Subsequently, OFPP was reauthorized for four more years.

Congress has made clear that a comprehensive approach to the federal government's system for procuring property and services of all types is needed. Thus, it directed OFPP, as its first priority, to develop and propose for implementation a uniform, comprehensive, innovative procurement system for use by federal agencies without regard to current barriers or statutory requirements. This system, the centerpiece of which is the Federal Acquisition Regulation (FAR), was implemented in April 1984.

Further overhaul of the federal government's procurement system must be made. Reauthorization of OFPP is necessary so that the goal of developing a single uniform procurement statute can be achieved. The existence of an organization such as OFPP will greatly assist Congress in its work of drafting this statute which will refine, enhance and advance procurement matters similar to those achieved when FAR was created from two major sets of procurement regulations.

The reauthorization of OFPP is also necessary so that uniform policy guidance on procurement issues can be provided to the federal awarding agencies. Providing uniform policy guidance will eliminate the many faces that the federal government often displays on interpretation of identical procurement provisions.

AGC encourages Congress to reauthorize OFPP in order that the federal government may speak with a single voice on procurement issues.

F
FINANCIAL EXECUTIVES
INSTITUTE

1100 Seventeenth St., N.W.
Suite 1203
Washington, D.C. 20036
(202) 659-3700

March 29, 1988

The Honorable Lawton Chiles, Chairman
Subcommittee on Federal Spending, Budget, and Accounting
Committee on Governmental Affairs
SD-326 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Chiles:

We respectfully submit the enclosed comments regarding the establishment of a Cost Accounting Standards Board for insertion in the hearing record of Friday, March 25, 1988.

Thank you for this opportunity to make our views known.

Sincerely,

Arthur H. Lowell

Arthur H. Lowell, Chairman
Committee on Government Business
Financial Executives Institute

Enclosure

Headquarters: 10 Madison Ave., Box 1938, Morristown, NJ 07960 (201) 898-4600

The Committee on Government Business (CGB) of the Financial Executives Institute (FEI) is pleased to submit its comments relative to the reestablishment of a cost accounting standards board. FEI is a professional organization of individual members who are senior financial and administrative officers in business organizations throughout the United States. FEI has over 13,000 members, affiliated with some 6,000 companies in virtually all segments of the economy, who represent a broad cross section of American business.

The Committee on Government Business is authorized to formulate FEI statements and positions relative to existing or proposed federal legislation and regulation designed to mandate accounting principles, standards and practice, record-keeping and reporting, and other financial-related rules to be followed by industry in providing goods and services to the Federal Government.

The Committee's involvement with Cost Accounting Standards (CAS) began in 1972, when the Cost Accounting Standards Board invited FEI to become an advisor to the CAS Board members and staff. In 1974 the CAS Board recognized the Committee's "leading role in assuring active participation by the accounting profession in the Board's research in the field of cost accounting" by presenting the FEI with its Public Service Award.

In 1980 the CAS Board was, in effect, disestablished. However, the need for an administrative body to issue waivers and exemptions, and to address questions of interpretation, clarification, and possible amendment of existing Standards remained. Mr. Elmer Staats, the former Comptroller General and CAS Board Chairman throughout its 10 years existence, addressed this concept in a letter written to FEI at that time:

> "While the basic Standards work has been completed, it is essential that some agency be authorized to modify and simplify existing standards, resolve questions that have occurred and will occur in the future, approve alternative disclosure statements which have to be developed to deal with special needs, and report to Congress on the status of actions taken."

The need for the authority described by Mr. Staats resulted in an exchange of letters between the Department of Defense and the Department of Justice in 1983. As you know, the Department of Justice advised the Department of Defense that it had the authority to adopt Cost Accounting Standards in whole or in part, and upon such adoption, to reject or grant exemptions to the CAS. While we are not qualified to discuss the legal questions that have been raised regarding the validity of the opinion, we believe that due to our close association with the operation of the CAS Board we are qualified to make recommendations regarding the structure, function, and composition of a Board with CAS authority. We offer six principal recommendations:

First, We recommend that a new Board be created. The Board should be independent of the procuring agencies but located within the executive branch of the federal government. It should be located independently or under the jurisdiction of the Office of Federal Procurement Policy (OFPP). Establishing the Board as a part of OFPP would facilitate the close coordination between the maintenance of the Standards and the maintenance of the Federal Acquisition Regulatory System currently under the control of OFPP. It is consistent with OFPP's oversight responsibility and the requirement of the Defense Production Act that the "standards shall be used by all relevant Federal agencies."

Mr. Charles Bowsher, the Comptroller General, expressed his concern that the Board be independent when testifying before your Subcommittee in 1984:

> "Our first concern is with the independence of a board located in the DOD. Independence was a primary feature sought by the Congress when it established the Cost Accounting Standards Board in 1970. We believe that it continues to be very important to insulate the responsibility for establishing, interpreting and updating the Standards from the influences associated with the procurement process. Satisfying the need for independence within an agency like DOD, with the largest procurement budget in the federal government, is problematic."

Second, in addition to the matters of allocability of cost addressed by the Standards, we recommend that the Board be responsible for the cost principles sections of the Federal Acquisition Regulation (FAR) dealing with the allowability and reasonableness of costs charged to U.S. Government contracts. A single organization responsible for both allocability and allowability, independent of the pressures of the procuring agencies, would minimize the conflicting and often conceptually different approaches which have created confusion, uncertainty, and enhanced the potential for abuse. Adequately staffed, the Board could produce cost rules on allowability that would be generally accepted as fair and reasonable, but more importantly, that would be clear and intelligible.

The cost principles policy formulation process within the Department of Defense is flawed. First, there is a lack of independence because the rules are written by individuals assigned to represent their acquisition organizations on the Defense Acquisition Regulations (DAR) Council and its subcommittees. Second, these representatives are assigned on a part time basis only, yet the cost principles have become so complex that full time staff of highly qualified professionals is vital. Third, the DAR Council members charged with making decisions based on the recommendations of the cost principles subcommittee are generalists in acquisition matters and are not always as well qualified as experts on cost accounting and allowability on government contracts. Lastly, the heavy workload of the Council affords little opportunity for the members to research and consult on changes to the cost principles and provides little time for industry to comment.

The conditions necessary to the development of cost accounting standards independence, a full time professional staff, expert decision makers, time for adequate research and consultation - are equally required for the development of cost principles. In retrospect we believe it would have been preferable to have consolidated these responsibilities when the CAS Board was formed in 1970 and we urge you to do so now.

Third, We recommend that the membership of the Board be as balanced as possible. The Board should be composed of six members, to be appointed by the President with the advice and consent of the Senate. The President should designate the administrator of OFPP as the chairman. We suggest that two members should be from the executive branch of the federal government. These members should hold a senior rank in a relevant department or agency and they should have experience regarding government contracting and cost accounting problems. Two members should be appointed from industry. One member should be a representative of the accounting profession, thoroughly knowledgeable in government contracting and cost accounting problems, especially those unique to small business. The members should be appointed for four (4) year terms which should be staggered.

Fourth, We recommend that an adequate number of staff with the appropriate credentials be provided to assure that resources are available for research and consultation by the Board. In addition, the backgrounds of the staff members should reflect the balanced composition of the Board in order to help preserve the independence of the Board. Ideally, this would result in two staff members from government, two from industry, and one from the accounting profession.

Fifth, We recommend that the new Board be required to solicit public comment with regard to any proposed rule, regulation, or standard and to give due consideration to such comments. A period of not less than 60 days is necessary to provide time for public comment.

Finally, We recommend that the statutory language authorizing the Board contain a positive statement requiring a rigorous examination of the cost/benefit relationship of all regulations issued by the Board.

We would like to offer one concluding observation. The business of doing business with the government has become inordinately complex and - in many respects - unnecessarily so. This has created increased potential for abuse but, more often, increased potential for innocent mistakes to be invariably perceived as criminal wrong doing. Public disclosure of seemingly improper charges to government contracts has and continues to undermine public confidence in the conduct of industry and in the ability of the government to manage the acquisition process. To begin to restore public confidence, we need to simplify and clarify the rules so that those who seek to comply with the intent and letter of the law are able to do so with confidence, care, and understanding and that those who manage the process can do so under simple and precise terms.

The Financial Executives Institute appreciates the opportunity to express its view on this matter.

ABA
AMERICAN BAR ASSOCIATION Section of Public Contract Law
Writer's Address and Telephone

1987-88
CHAIRMAN
C. Stanley Dees
1575 Eye Street, NW
Suite 800
Washington, DC 20005
202/789-7628
ABA/net ABA2141

CHAIRMAN-ELECT
Thomas J. Madden
1301 Pennsylvania Avenue, NW
Suite 1200
Washington, DC 20004
202/662-4303

VICE-CHAIRMAN
Donald G. Gavin
8230 Boone Boulevard
4th Floor
Vienna, VA 22180
703/790-8750

SECRETARY
Norman L. Roberts
360 North Crescent Drive
Beverly Hills, CA 90210-4867
213/859-5985

BUDGET AND FINANCE OFFICER
Donald J. Kinlin
2000 Courthouse Square
P. O. Box 1817
Dayton, OH 45401
513/226-4922

SECTION DELEGATE
Marshall J. Doke, Jr.
4300 Republic Bank Tower
Dallas, TX 75201
214/754-9413

IMMEDIATE AND PREVIOUS
PAST CHAIRMEN
Paul G. Dembling
1111 19th Street, NW
Suite 1000
Washington, DC 20036
202/463-2920

James J. Myers
One Post Office Square
Suite 3700
Boston, MA 02109
617/357-8700

COUNCIL MEMBERS
Donald P. Arnavas
1200 18th Street, NW
Washington, DC 20036

King K. Culp
1313 Production Road
Fort Wayne, IN 46808

Michael J. Ladino
1747 Pennsylvania Avenue, NW
Washington, DC 20006

Margaret E. McConnell
100 West Washington Street
Phoenix, AZ 85003

Thomas L. Patten
1333 New Hampshire Avenue, NW
Washington, DC 20036

John T. Sant
P. O. Box 516
St. Louis, MO 63166

Leonard Suchanek
18th & F Streets, NW
Washington, DC 20405

Norman R. Thorpe
Hq. AFLC/JA
Wright Patterson AFB, OH 45433

Karen Hastie Williams
1001 Pennsylvania Avenue, NW
Washington, DC 20004-2505

EDITOR, PUBLIC CONTRACT
LAW JOURNAL
Matthew S. Simchak
1001 22nd Street, NW
Washington, DC 20037

EDITOR, PUBLIC CONTRACT
NEWSLETTER
Martin J. Harty
9926 Rand Drive
Burke, VA 22015

BOARD OF GOVERNORS LIAISON
Edward L. Benoit
P. O. Box 366
Twin Falls, ID 83303-0366

YOUNG LAWYERS LIAISON
Mary Ellen Coster Williams
1728 Massachusetts Avenue, NW
Washington, DC 20036

LAW STUDENT LIAISON
Michael K. Hogan
2015 Huntington
Oklahoma City, OK 73116

SECTION ADMINISTRATOR
Marilyn Neforas
750 North Lake Shore Drive
Chicago, IL 60611
312/988-5596
ABA/net ABA290

1575 Eye Street, N.W.
Washington, D.C. 20005
202/789-7628
March 3, 1988

Honorable Lawton Chiles
Chairman
Subcommittee on Federal Spending,
  Budget and Accounting
326 Dirksen Senate Office Building
Washington, D.C. 20510-6258

Re: Office of Federal procurement Policy
Act Amendments of 1987

Dear Senator Chiles:

By letter dated February 12, 1988, the Public Contract Law Section of the ABA submitted its views on H.R. 3345. Section 5 of the House bill would re-establish the Cost Accounting Standards Board and define the scope of authority. The Public Contract Law Section has prepared a "white paper" on the history of the CAS Board and the issues presented by this portion of H.R. 3345. I am enclosing a copy of that white paper with a view that it might be of assistance to the Subcommittee on Federal Spending, Budgeting and Accounting during its consideration of any legislation concerning the establishment of a CAS Board.

Sincerely,

C. Stanley Dees
Chairman
Public Contract Law Section

CSD/mdb
Enclosure

AMERICAN BAR ASSOCIATION
SECTION ON PUBLIC CONTRACT LAW
ACCOUNTING, COST AND PRICING COMMITTEE
WHITE PAPER

A RECONSTITUTED COST ACCOUNTING STANDARDS BOARD: AN EVALUATION OF ITS NECESSITY, STRUCTURE, AND SCOPE

February 8, 1988

PREFACE

At its August 1987 Annual Meeting, the Council of the Public Contract Law Section of the American Bar Association requested that the Accounting, Cost and Pricing Committee ("Committee") prepare a White Paper for use by the Council in considering issues presented by proposed legislation to establish a new Cost Accounting Standards Board ("CAS Board"), and, in particular, H.R. 3345 (the OFPP Act Amendments of 1987). The Committee presented a White Paper to the Council on November 14, 1987, at its Fall Meeting in Boca Raton, Florida.1/ The Council further considered the issue of legislation to establish a CAS Board at a special meeting held on December 15, 1987 in Washington, D.C. At that meeting, the Council indicated its support for establishment of a new CAS Board and took action to adopt guidelines that legislation regarding such a Board should follow.2/

The Council believes that the discussion of CAS issues in the White Paper may be of general interest in connection with consideration of proposals, such as HR 3345, to establish a new CAS Board. The Council has therefore decided to permit the White

---

1/ Kathleen C. Barger, Chair, Accounting, Cost and Pricing Committee.
Author: Thomas P. Barletta.
Contributors: Roger N. Boyd, Clarence T. Kipps, Jr., Lynda Troutman O'Sullivan, and Louis I. Rosen.

2/ At its February 6, 1988 Mid-Year Meeting, the Council approved a letter on H.R. 3345 for submittal to Sen. Chiles which restated the guidelines adopted by the Council regarding legislation to establish a new CAS Board. Those guidelines are reprinted in Appendix A.

Paper to be made available as a background document on the subject. The Council has not, however, formally adopted or otherwise approved the White Paper as a statement of its views on H.R. 3345. Rather, the Council's position on legislation to reestablish a CAS Board, and in particular, H.R. 3345, is as stated in the guidelines reprinted in Appendix A.

TABLE OF CONTENTS

Page

I. THE COST ACCOUNTING STANDARDS BOARD (1970 to 1980).. 1

II. AN OVERVIEW OF SIGNIFICANT EVENTS SINCE CONGRESS TERMINATED FUNDING OF THE CAS BOARD............. 4

  A. The Boeing Case............................ 4

  B. The DOD CAS Policy Group.................. 7

    1. Establishment of The DOD CAS Policy Group........................... 7

    2. The DOD CAS Policy Group - Legal and Policy Issues........................ 8

    3. DOD CAS Policy Group Initiatives....... 10

  C. Legislative Initiatives - An Overview....... 11

III. PRINCIPAL ISSUES RAISED BY RECENT LEGISLATIVE INITIATIVES FOR A NEW CAS BOARD................. 13

  A. Need For A Reconstituted CAS Board.......... 14

    1. Background............................ 14

    2. Policy Considerations................. 16

      a. Promulgation of additional standards/modification of existing standards........................ 17

      b. Interpretations of existing standards........................ 20

  B. Constitutional Considerations And Limitations.................................... 27

  C. The Role Of The CAS Board In The Determination Of The Allowability Of Contract Costs.. 30

  D. Overview Of Other Provisions Of The Brooks Bill Relating To CAS...................... 37

    1. Contract Coverage..................... 37

    2. Exceptions to Contract Coverage........ 38

3. Disclosure and Contract Price Adjustments.................................. 38

4. Disputes................................ 39

5. Exemptions and Waivers................. 39

6. Procedures............................. 39

7. Effective Dates........................ 41

8. Access to Records...................... 41

A RECONSTITUTED COST ACCOUNTING STANDARDS BOARD: AN EVALUATION OF ITS NECESSITY, STRUCTURE, AND SCOPE

Since Congress ceased funding the Cost Accounting Standards Board ("CAS Board" or "Board") in 1980, there have been a number of significant policy and regulatory changes relating to contract costing. Despite considerable debate over whether the Board should be reconstituted, the cost accounting standards ("CAS") promulgated by the Board have, however, remained unchanged. In addition, questions concerning the scope, application and interpretation of the original standards continue to arise.

Today, attention is again focused on the need for, and shape of, a CAS Board. This paper will review briefly the origins and activities of the former CAS Board, examine some of the significant events that have occurred in the cost accounting standards area since the CAS Board's termination, and consider some of the principal policy issues raised by proposals to reconstitute a CAS Board, particularly H.R. 3345.1/

I. THE COST ACCOUNTING STANDARDS BOARD (1970 to 1980)

The Cost Accounting Standards Board was created in 1970 by Public Law 91-379 as an agent of Congress independent of the

---

1/ H.R. 3345, 100th Cong., 1st Sess. § 5 (1987) (H.R. 3345 or the "Brooks Bill"). (Attached as Appendix B.)

Executive Branch.[2] The Board was granted authority to issue standards designed to achieve "uniformity and consistency" in accounting principles among defense contractors and subcontractors for estimating, accumulating, and reporting costs. The Comptroller General was the Chairperson of the Board and was given the power to appoint the other Board members. Two of the appointees were to be from the accounting profession, one from the defense industry, and one from government. In addition to the five board members, the CAS Board staff consisted of an executive secretary, counsel, thirteen to seventeen other professionals, and twelve administrative employees. Pub. L. No. 91-379 also provided for a disclosure statement, contract price adjustments for failure to follow the standards or disclosed accounting practices, and permitted the CAS Board to grant waivers and exemptions when appropriate.

Between 1972 and 1980, the CAS Board issued nineteen Cost Accounting Standards. In addition, the Board promulgated regulations governing disclosure of accounting practices, raised the initial threshold for contract coverage from $100,000 to

---

2/ Defense Production Act Amendments, Pub. L. No. 91-379, 84 Stat. 796 (1970), codified at 50 U.S.C. app. § 2168 ("Pub. L. No. 91-379"). Pub. L. No. 91-379 followed a feasibility study by the Comptroller General, pursuant to Pub. L. No. 90-370, which concluded that it was possible to establish Cost Accounting Standards to provide greater "uniformity and consistency" among defense contractors' cost accounting practices. The study also noted that "new machinery" would be needed to establish such standards. Report on the Feasibility of Applying Uniform Cost Accounting Standards to Negotiated Defense Contracts, B-39995(1), Jan. 1970. Congress directed the study in response to complaints from DOD that the lack of uniform accounting procedures among defense contractors limited its ability to determine cost and profit.

$500,000 and established modified CAS coverage for contractors with awards below certain specified dollar and sales thresholds. The Board also issued standard CAS compliance exemptions for small business concerns, changed the threshold for capitalizing assets, and issued a handful of position papers and interpretations on some of the standards it promulgated.

During the life of the Board, critics charged that it was too complex and that there were no controls on the number of standards it was releasing. By the end of the decade, these arguments were mixed with the proposition that the Board's purposes had been served by the nineteen standards it had created. Moreover, the constitutional questions that surrounded the formation of the Board continued to linger and cast doubt upon the Board's continuing viability.[3/]

Congress began phasing out the CAS Board between 1979 and 1980, and all appropriations were terminated in 1980. The statute establishing the Board, however, was never abolished. 50 U.S.C. app. § 2168. The Cost Accounting Standards issued by the Board remain regulatory requirements. See 4 C.F.R. §§ 400-420 (1986).

[3/] See, e.g., 850 FCR A-17-18 (1980) (reporting on testimony before the Senate Banking Committee); 805 FCR A-20-23 (1979) (reporting on testimony before the Senate Banking Committee); Letter from Dale Church, Deputy Under Secretary (Acquisition Policy) to Elmer Staats, Comptroller General ("Church letter") (reprinted in 773 FCR A-5 (1979)). See also 786 FCR A-21 (1979).

II. AN OVERVIEW OF SIGNIFICANT EVENTS SINCE CONGRESS TERMINATED FUNDING OF THE CAS BOARD

With the termination of the CAS Board, there no longer is an official mechanism to consider possible new cost accounting standards or to issue exemptions, interpretations or modifications to the nineteen existing Cost Accounting Standards. Congress has periodically considered reestablishing a cost accounting standards board, and legislation is currently pending before both the House and Senate to establish a CAS Board within the Office of Federal Procurement Policy ("OFPP").[4/] Meanwhile, decisions in two cases brought by the Boeing Company have had a significant impact on cost accounting regulation and practice,[5/] and the Department of Defense has attempted to assume regulatory authority over cost accounting questions through its CAS Policy Group.

A. The Boeing Cases

The decisions in Boeing I and Boeing II raise several issues that are directly pertinent to consideration of reconstitution of a CAS Board. These include constitutional limits on the structure of a CAS Board, DOD's authority to assume

---

[4/] See H.R. 3345; S.852, 100th Cong., 1st Sess. (1987).

[5/] See Boeing Co. v. United States, 680 F.2d 132 (Ct. Cl. 1982), cert. denied, 460 U.S. 1081 (1983) ("Boeing I"); Boeing Co., ASBCA No. 28342, 85-3 B.C.A. (CCH) ¶ 18,435 (1985), aff'd sub nom. United States v. Boeing Co., 802 F.2d 1390 (Fed. Cir. 1986) ("Boeing II").

regulatory authority over CAS, and the relationship between the cost principles of FAR Part 31 and the CAS.

Boeing I involved a dispute over Boeing's allocation of home office tax expenses to various business segments under CAS 403. The Armed Services Board of Contract Appeals (ASBCA) held that state and local taxes had to be allocated on the same basis as the tax was assessed. Boeing's allocation on the basis of headcount was rejected in favor of allocation on the basis of the property of each segment.[6]

The significant aspect of the decision is that in the Court of Claims Boeing not only sought reversal of the ASBCA's decision on the allocation issue, but also argued that regardless of the correct interpretation of CAS 403, the CAS Board was unconstitutionally established because the Comptroller General, as an official of the legislative branch, could not appoint a Board with regulatory authority and that, therefore, the standards it had issued were void. See Boeing I, 680 F.2d at 140-141. The Court of Claims did not rule on the constitutional issues, but instead ruled that even if Boeing was correct in its constitutional argument, the Department of Defense was still free to "find and pick" its cost standards from wherever it chooses,

---

6/ Boeing had distributed this cost on the basis of headcount, on the argument that the tax was assessed in order to provide benefits for the citizens of the state and, therefore, each segment's costs should parallel the benefits received.

"so long as those standards were substantively proper." Id. at 141.[7]

In Boeing II the Board of Contract Appeals found a conflict between CAS and DAR and held that CAS was controlling. Boeing had allocated its pension costs to government contracts on an accrual basis, pursuant to CAS 412. This method of allocating the costs was flatly inconsistent with DAR 15-205.6(f), which made allowability depend upon allocation in accordance with the Internal Revenue Code, which meant the costs would be allocable only in the year they were paid out. The ASBCA, after rejecting the government's arguments that there was no real conflict, examined the separate lines of statutory authority for CAS and DAR, 50 U.S.C. § 2168 (for CAS) and 10 U.S.C. § 2202 (for the cost principle), and decided that on questions of "estimating, accumulating, and reporting costs" the CAS prevailed over any inconsistent cost principle.[8] To alter the accounting methods required by CAS, DOD would need authority to amend CAS requirements dealing with the subject matter. Boeing II suggests that given the statutory basis for the CAS in the first instance, DOD would require specific statutory authority to change the old standards.[9]

7/ The Court also noted that any constitutional ruling would not be applied retroactively, given the number of contracts using CAS, under the principle of "de facto" officer of the United States in Buckley v. Valeo, 424 U.S. 1 (1976).

8/ 85-3 B.C.A. (CCH) ¶ 18,435 at 92,606.

9/ Boeing II could be interpreted to suggest that mere incorporation of CAS into FAR would be insufficient to overcome (continued...)

B. The DOD CAS Policy Group

1. Establishment of The DOD CAS Policy Group

In 1984, the DOD proposed to establish a CAS Board within the department and officially established a CAS Policy Group within DOD in 1985.[10] The make-up of the CAS Policy Group is noticeably different from the original CAS Board, which included an institutionalized representation of the defense industry and the public accounting profession. The policy group has a full-time chair and consists of part-time representatives from the Army, Navy, Defense Logistics Agency ("DLA"), and NASA. In addition, the Board includes four non-voting members, including representatives from the DCAA, the office of the Secretary of Defense, and the General Services Administration. As proposed, the Board was to provide recommendations to the DAR Council for modifications, waivers and exemptions to existing standards, and the promulgation of new standards.[11]

9/ (...continued)
ASBCA concerns in this area. The effect of Boeing II on the recent incorporation of CAS into FAR is yet to be tested in the ASBCA or the courts.

[10] See DOD Concept Paper Regarding Organization of CAS Board Within The Defense Department and CAS Issues Identified by DOD Offices, Jan. 18, 1984 (reprinted in 41 FCR 179 (1984)); Memorandum from James T. Brannon, Director Defense Acquisition Regulatory System, to Deputy Under Secretary of Defense for Acquisition Management (Aug. 16, 1984) (Subject: Cost Accounting Standards) (reprinted in 42 FCR 340 (1984)).

[11] See 42 FCR 340 (1984).

2. The DOD CAS Policy Group - Legal and Policy Issues

In establishing the CAS Policy Group, DOD relied on a letter from the Department of Justice that DOD was legally free to adopt, reject or grant exemptions to the CAS.[12/] The DOJ letter relied primarily on the decision in Boeing I, construing it as having "upheld [DOD's] wide discretion in adopting cost accounting standards based on the CAS as promulgated by the now-defunct Cost Accounting Standards Board or other permissible sources."[13/]

The DOJ letter arguably rests on a very broad reading of Boeing I. The dictum in Boeing I was limited to affirming DOD's right to adopt previously existing standards notwithstanding the alleged unconstitutionality of the Board that created them. The extent of the DOD's power to modify or ignore any of the standards was neither presented nor decided by the Court of Claims in Boeing I. Moreover, the Court of Claims limited DOD's choice of standards to those which were "substantively correct." Arguably, this would be only the nineteen standards published by the CAS Board that DOD is required to use pursuant to Pub. L. No.

[12/] Letter from Larry L. Simms, Deputy Assistant Attorney General, Office of Legal Council, to William H. Taft IV, General Counsel, Department of Defense (reprinted in 41 FCR 69 (1984)).

[13/] Id. DOJ also relied on the argument it had made before the Court of Claims in Boeing I that the CAS were not legally binding but that federal agencies such as DOD could adopt them as a matter of discretion and require contractors to follow them as a matter of the agency's own statutory power. Id.

91-379.[14] In a 1984 letter to the Department of Defense, the American Bar Association Section on Public Contract Law ("the Section") took the position that:

> DOD is clearly precluded from demanding that contractors estimate, accumulate, and report costs in a way that is different from the CAS requirements. The Defense Department cannot arbitrarily choose to overrule the standards which it finds objectionable and require that contractors follow allocation practices which are inconsistent with the CAS requirements.[15]

As noted above, Boeing II arguably further constrains DOD's ability to modify existing CAS. DOD is required to use the cost accounting standards promulgated by the CAS Board. Those standards have the force and effect of law, and Congress has not authorized DOD to modify them by regulation.

Finally, objections to DOD's CAS Policy Group have also been raised on the grounds that having the CAS Board function within a procuring agency threatens its objectivity and independence and that, as currently composed, it lacks sufficient accounting expertise.[16]

---

[14] Pub. L. No. 91-379 provided that the standards published by the CAS Board "shall be used" by DOD.

[15] Letter from Thomas E. Abernathy, IV, ABA Public Contracts Section, to Hon. Mary Ann Gilleece, Deputy Secretary of Defense for Acquisition Management (Mar. 23, 1984) (Re: DOD Proposal to Establish a CAS Board) at 2. (Attached as Appendix C.)

[16] See 41 FCR 451 (1984) (reporting testimony of Comptroller General Charles Bowsher); 41 FCR 873 (reporting on letter from Congres man Jack Brooks to Secretary of Defense Weinberger). See also Letter from Hon. Ruth C. Burg, ABA Public Contracts Section, to (continued...)

3. DOD CAS Policy Group Initiatives

With the possible exception of its incorporation into the FAR of the CAS Board's Interpretation No. 1 to CAS 403,[17] the DOD CAS Policy Group has not taken any actions to date that would significantly alter the existing CAS structure.[18] Upon the initiative of the Policy Group, the Cost Accounting Standards have been incorporated into Part 31 of the FAR.[19] DOD has also proposed to raise the threshold for capitalizing assets from $1,000 to $1,500 in CAS 404, Capitalization of Tangible Capital Assets, and to substitute the United States Treasury rate for

---

16/ (...continued) Hon. Mary Ann Gilleece, Deputy Undersecretary Acquisition Management (Mar. 29, 1985) (Re: DOD Proposal to Establish an Internal Cost Accounting Standards Board). (Attached as Appendix D.); The Government Contractor, vol. 27, no. 3 ¶ 32 (re GAO letter to DARC Director James Brannan). Both the GAO and Congressman Brooks had also objected to the initial DOD proposal on the ground that it would result in inconsistency in accounting regulations among agencies (DOD, NASA and DOE) subject to CAS. See 41 FCR 451, 711.

[17] See FAR 30.403-70, 52 Fed. Reg. 35,612, 35,626 (1987). See also letter from Wallace H. Robinson, Jr., President, National Security Industrial Association, to Robert P. Bedell, Administrator, Office of Federal Procurement Policy (Dec. 7, 1987).

[18] The DOD's involvement in CAS issues, however, is not without precedent. The Cost Accounting Standards, as they were issued, were published as Appendix O to the DAR. In addition, the Department issued administrative guidance on CAS in DAR § 3, Part 12. The CAS Working Group, established in 1976, issued 24 working group papers on CAS issues. Finally, the DOD was involved in monitoring and reporting non-compliance with the CAS.

[19] 52 Fed. Reg 35,612 (1987). This was a verbatim transfer of the CAS into the FAR, except for movement of interpretations from Appendices directly into the CAS and the deletion of references to the original CAS Board. Incorporation makes the CAS subject to the same procedures that are followed for revising the FAR. See id.

state rates in discounting certain self insurance losses in CAS 416, Accounting for Insurance.[20] In addition, the DOD CAS Policy Group is considering changes to CAS in the following areas:[21]

(1) Pension Plan Termination;

(2) Overfunded Ongoing Pension Plans;

(3) Asset Revaluation at Merger, and

(4) Pay-As-You-Go (PAYG) Pension Plans.

DOD has also indicated that future CAS changes will take into account the cost principles of Part 31 of the FAR and that "joint proposals," involving both allowability and allocability of government contract costs, may be issued.[22] This action reflects a recognition of the interrelationship of cost allowability and allocability, discussed in more detail below. The incorporation of CAS into the FAR also permits the two sets of regulations to be considered together.

C. Legislative Initiatives - An Overview

Even before the CAS Board expired for lack of funding, legislation (H.R. 5800) was proposed to transfer CAS authority to the Office of Management and Budget.[23/] Reconstitution of a CAS Board also received serious consideration in 1984 with the introduction of H.R. 5480 by Rep. LaFalce.[24/] The LaFalce Bill provided for a five member board, chaired by the Comptroller General with four members (one from industry, one from government and two from the accounting profession) to be appointed by the President. As proposed, the Board would have had authority to issue new standards and to interpret, modify, waive or rescind existing ones.[25/]

---

[20] See 48 FCR 171 (1987).

[21] See ABA Public Contract Section, Program on Contract Cost Issues, Tab H, DOD Cost Accounting Standards Policy Group (Oct. 1, 1987), which summarizes DOD's views on possible CAS changes in these areas.

[22] See 48 FCR 171 (1987).

More recently, legislation proposed by Rep. Jack Brooks to reauthorize the OFPP provides for the establishment of a CAS Board within OFPP.[26/] The Brooks Bill provides for a seven member board, chaired by the Administrator of OFPP, with two

---

[23/] See 849 FCR AA-1-2, E-1-2 (1980). The emphasis of that proposal was on maintenance, interpretation and modification to existing standards, rather than the promulgation of new standards. See id. See also 850 FCR A-15-16 (1980).

[24/] See Hearings on H.R. 5480 Before the Subcomm. on Economic Stabilization of the House Comm. on Banking, Finance and Urban Affairs, 98th Cong., 2d Sess. (1984) ("1984 Hearings"). The question of reconstituting a CAS Board also was addressed in hearings before the Senate Governmental Affairs Committee in 1983. See Hearings on Management of the Department of Defense, Part 3, Cost Accounting Standards Before the Senate Comm. on Governmental Affairs, 98th Cong., 1st Sess. 1, 1-102 (1983) ("1983 Hearings").

[25/] See 41 FCR 711, 735 (1984).

[26/] H.R. 3345. (See Appendix B.) Section 5 of H.R. 3345 would amend the OFPP Act by adding § 26 to provide for a Cost Accounting Standards Board. References to specific provisions of H.R. 3345 in this paper are therefore to § 26. In contrast to the Brooks Bill, S. 852 would authorize the Administrator of OFPP to promulgate cost accounting standards. It would, however, also provide for a Cost Accounting and Profits Reports Advisory Council, consisting of the Comptroller General and four persons appointed by him. See S. 852 §§ 102, 103(b)(1).

government representatives (one from DOD and one from a civilian agency), two representatives of industry, and two CPAs,[27] as well as for a secretary and appointment of necessary staff.[28] As currently proposed,

> [t]he Board shall have the exclusive authority to make, promulgate, amend, rescind, and enforce cost accounting standards, cost principles, and interpretations thereof designed to achieve uniformity, consistency, and equity in the cost accounting standards governing measurement, assignment, and allocation of costs to contracts with the United States and the cost principles governing allowability of costs on contracts with the United States.[29]

III. PRINCIPAL ISSUES RAISED BY RECENT LEGISLATIVE INITIATIVES FOR A NEW CAS BOARD

Proposed legislation to reconstitute a CAS Board raises a number of policy issues. These include (1) a threshold question regarding the need, if any, for a new CAS Board; (2) questions of constitutional limitations on the formation of a

---

[27] *See* H.R. 3345 § 26(a)(1). The DOD representative is to be appointed by the Secretary of Defense; the civilian agency representative is to be appointed by the head of a civilian agency designated by the Administrator. The other members are to be appointed by the Administrator of OFPP.

[28] *See* H.R. 3345 §§ 26(b), (c). The Board is also authorized to appoint advisory committees and task forces of persons from government and private life to assist it in carrying out its function. *See* H.R. 3345 § 26(d).

[29] H.R. 3345 § 26(f)(1). In addition, the Brooks Bill grants "[t]he *Administrator*, after consultation with Board, . . . *exclusive authority* to make, promulgate . . . and enforce rules and regulations for the implementation of [the] cost accounting standards or cost principles." H.R. 3345 § 26(g)(1). (Emphasis added.)

CAS Board; (3) whether the Board should have authority over allowability as well as allocability; and finally, (4) other considerations relating to the operation and functions of the new Board as proposed in H.R. 3345.

A. Need For A Reconstituted CAS Board

1. Background

By the time Congress terminated funding for the CAS Board in 1980, there appears to have been a general consensus that it had, or should have, addressed the major cost accounting issues requiring promulgation of standards.[30] Questions were raised as to the need for promulgation of additional standards, and both industry and DOD expressed concern as to the costs and administrative disruption arising out of revising cost accounting systems in response to CAS Board promulgations.[31] The Board was also criticized for the manner in which it had complied with, or failed to comply with, the requirements of Pub. L. No. 91-379 to consider and compare the probable costs and benefits of implementing its standards.[32]

---

[30] See 805 FCR A-20-23 (1979) (reporting on testimony before the Senate Banking committee.) See also Church letter, supra; 814 FCR A-19 (1980) (reporting on 1979 CAS Board report to Congress); 850 FCR A-17-18 (1980) (reporting on testimony before the Senate Banking Committee); Legislative Branch Appropriations Bill 1981, H.R. Rep. No. 96-1098, 96th Cong., 2d Sess., at 35-36 (1980).

[31] See, e.g., Church letter, supra.

[32] See, e.g., 805 FCR A-22 (1980) (reporting on comments of Sen. Garn).

Nonetheless, the government, including DOD, has generally supported reconstituting a CAS Board,[33] although DOD's support has waned with the establishment of the CAS Policy Group within the Department.[34] On the other hand, there has been a diversity of views among those outside of government as to the need for a new CAS Board. Some within industry have opposed reestablishment of a CAS Board with the broad authority it once had (*e.g.*, with authority to issue new as opposed to maintaining existing standards).[35] Others have supported establishing a group that would function essentially like the original CAS

---

[33] *See* 41 FCR 873 (1984) (DOD); *id*. at 919 (Comptroller General); Letter from James R. Richards, Inspector General, Department of Energy, to Sen. William Roth, Jr. (May 17, 1983) (*reprinted in* 1983 Hearings at 96); Letter from June Gibbs Brown, Inspector General NASA to Terry Jolly (*reprinted in* 1983 Hearings at 101); Statement of Charles O. Starrett, Jr., Director Defense Contract Audit Agency, 1983 Hearings at 62-67. *But see* 41 FCR at 918 (reporting on testimony of Mary Ann Gilleece, Deputy Under Secretary of Defense (Acquisition Management) on H.R. 5480). Moreover, in a recent interview, OFPP Administrator, Robert Bedell, expressed concerns regarding certain aspects of H.R. 3345 as it relates assignment of CAS Board functions to OFPP. Defense News, Jan. 4, 1988, at 22.

[34] In an August 18, 1987 letter to Congressman Brooks, former Under Secretary of Defense for Acquisition Richard Godwin indicated that he did not believe there was a need for a new CAS Board and expressed confidence in the ability of the DOD CAS Policy Group to address CAS issues. However, Godwin also stated that if a new Board is created it should be within the executive branch (OFPP). (*Reprinted in* 48 FCR 243 (1987).)

[35] *See generally* Statement of Peter F. McCloskey, President Electronic Industries Association, 1984 Hearings at 95-99; McDonnell Douglas Corp., *Statement on H.R. 5480, Cost Accounting Standards Board Amendments of 1984*, 1984 Hearings at 110-115; 850 FCR A-18 (1980) (reporting on testimony of representatives of the Boeing Company and TRW.)

Board;[36] still other commentators favor reconstituting a CAS Board and expanding its authority to address allowability as well as allocability.[37]

2. Policy Considerations

The existing nineteen cost accounting standards have the force and effect of law. However, there is currently no body with statutory authority to amend, interpret, or grant exemptions or waivers to existing standards or to promulgate additional standards if necessary. As a result, the government contracts community has been left with a fixed set of mandatory accounting rules frozen as they stood in 1980. The original CAS are, of course, subject to interpretation by the ASBCA or the courts in connection with adjudication of disputes arising under contracts. However, in the absence of congressional action on a specific government contract cost accounting question, which is highly unlikely, there is no mechanism for legislative/regulatory response to decisions of "statutory" interpretation involving the CAS. This structural rigidity is arguably undesirable as a matter of overall procurement policy. This, together with questions regarding the legal authority of the DOD CAS Policy Group to regulate CAS issues, suggests a need for legislative action to reestablish an administrative mechanism with jurisdiction over government contract cost accounting questions.

---

[36] See, e.g., Statement of Frederick Neuman, C.P.A., 1983 Hearings at 85, 88; Statement of Bertold Bodenheimer, 1983 Hearings at 68. See also Statement of Nelson Shapiro, C.P.A., on behalf of the National Security Industrial Association ("NSIA"), 1984 Hearings at 79.

[37] See Statement of Clarence T. Kipps, 1984 Hearings at 50, 52-56. See also Statement of NSIA, 1984 Hearings at 80-83.

a. Promulgation of additional standards/ modification of existing standards

At the time the CAS Board went out of existence in 1980, there were several cost accounting issues under consideration for proposed standards that were never finalized. These included: selling and marketing costs, deferred research and development costs, costs of "special facilities" and joint product costing.[38] A reconstituted CAS Board could consider these issues. However, at this time, there is apparently not an articulated consensus as to a need for particular additional standards. In its 1984 letter responding to DOD's proposal to establish a CAS Board within DOD, the Section expressed the view that

> [a]lthough there are some exceptions, most contractors have found that the Standards are not as bad as they had anticipated. The trauma of reforming their accounting systems is now over. Contractors have found that the Standards are, by and large, fair and equitable to both parties and in accordance with good accounting practices. Most importantly, the fundamental requirement in the Standards -- consistency -- has provided a salutary level of stability and predictability in the cost regulations.[39]

---

[38] See Testimony of Bertold Bodenheimer, 1983 Hearings at 78. See also 805 FCR A-22 (1980) (testimony of Elmer Staats, Comptroller General).

[39] Letter from Thomas E. Abernathy (Appendix C) at 2.

Likewise, to date DOD generally appears to have focused on modifications to existing standards, rather than promulgation of new ones.

Given this context in which the major issues appear settled, we note, as some have suggested in the past, that one option is to limit the authority of a new CAS Board to modification of existing standards and other acts of adjustment and refinement of a fixed set of standards.

We believe, nevertheless, that if there is legislation reestablishing a CAS Board, the Board should have statutory authority to promulgate new standards where necessary.[40] It is not wise to consider the issues closed indefinitely, especially in accounting, where, because it deals with business, flux is inherent. As one commentator observed:

> [s]ince accounting tracks economic conditions and cannot remain static if it is to reflect the financial and economic factors of conducting business, there may also be a need for some new standard or benchmark to achieve uniformity of treatment. The Financial Accounting Standards Board (FASB) and its predecessor professional bodies have been issuing standards of accountability for its practitioners for many years and to this day is still active. Why should it be different regarding cost accounting standards?[41]

---

[40] We also note, as some have suggested, that establishing a CAS Board with authority to promulgate new standards may, as a practical matter, lead to that result.

[41] Statement of Frederick Neuman, C.P.A., 1983 Hearings at 87.

The CAS Board should be capable of deciding whether changing financial and economic factors justify new CAS.

Although immediate need for additional standards may be unclear, DOD at least has identified a number of issues relating to existing standards that it believes require attention at this time. As noted above, these include proposed modifications to CAS 404 and 416, and possible CAS changes with respect to pension plan terminations, overfunded ongoing pension plans, asset revaluation at merger, and pay-as-you-go pension plans. In addition, when DOD originally proposed to establish its internal CAS Board, it also published a list of "near-term," "long-term," and "continuing" CAS issues, which had been identified by DOD components.[42]

---

[42] That list of issues, as reprinted at 41 FCR 180 (1984), was as follows:

NEAR-TERM

1. CAS 416 - Use of state rates as discount factors
2. CAS 408 - Banked vacation
3. CAS 416 - Criteria or financial capability to self-insure
4. CAS 416 - Cash Management plan
5. CAS 417 - Clarification of what "construction means"
6. CAS 403 - Significance of CAS Board Interpretation No. 1 has been clouded by the Lockheed ASBCA decision.

LONG-TERM

1. CAS 410 - Clarify criteria for use of various allocation bases.
2. CAS 404 - Review need to change method of evaluation of assets where an acquisition of a company is involved.
3. Legislative initiative to delete seven percent limitation on interest contained in PL 91-379

(continued...)

b. Interpretations of existing standards

Although Pub. L. No. 91-379 did not expressly authorize the old CAS Board to issue interpretations, the Board declared that interpretations of its standards would be appropriate in certain circumstances:

> [w]hen there are widespread and serious questions of the Board's intention or meaning in its promulgations ..., the Board may at its discretion respond to requests for authoritative interpretations of its rules, regulations, and Cost Accounting Standards. Such interpretations will be published in the *Federal Register* and will be considered by the Board as an integral part of the rules, regulations, and Standards to which the interpretations relate.[43]

The original Board issued only a few interpretations, and its authority to do so was criticized and ultimately restricted by ASBCA decisions, especially where the CAS Board's interpretation was inconsistent with the ASBCA's view.

42/ (...continued)

4. Review and update Disclosure Statement
5. Make price competition exemption consistent with exemption used for cost or pricing data.
6. CAS 409 - Criteria for use of various depreciation methods may need clarification.
7. Revise materiality criteria to include cost shifts among government programs.
8. Review Working Group papers and incorporate concept into CAS, DAR, or cancel.

CONTINUING

1. Adjusting to thresholds in various standards, such as capitalization threshold in CAS 404.
2. Interpretation.
3. Review and recommend resolution of conflicts with DAR.

[43] CAS Board, *Restatement of Objectives, Policies and Concepts* ("Restatement"), Cost Accounting Stand. Guide (CCH) ¶ 2915 (emphasis added).

The CAS Board's attempt to dictate the result in McDonnell Douglas Corp.,[44] through interpretation of CAS 403 before the case was finally decided is a telling instance of both a disagreement between the Board and the ASBCA and the troubling question of the authority of the CAS Board to issue interpretations. ASBCA cases had allowed contractors to take into account segment book income when allocating state and local income taxes.[45] The CAS Board then issued an interpretation of CAS 403 on the same subject matter after the ASBCA decisions but prior to the ASBCA's decision on a motion for reconsideration in the McDonnell Douglas case.[46] Contrary to the ASBCA position, the CAS Board interpretation allowed for considerations of segment book income only when the taxing jurisdiction uses that figure in assessing tax liability.[47] The CAS Board stated that its interpretation was a response to questions that "have arisen" with regard to CAS 403 but failed to note that those questions arose as a result of decided ASBCA cases.[48]

---

[44] McDonnell Douglas Corp., ASBCA No. 19842, 80-1 B.C.A. (CCH) ¶ 14,223 (1979); aff'd on reconsideration, 80-2 B.C.A. (CCH) ¶ 14,508 (1980).

[45] See, e.g., Lockheed Corp., Lockheed Missiles & Space Co., ASBCA No. 22451, 80-1 B.C.A. (CCH) ¶ 14,222 (1979); aff'd on reconsideration, 80-2 B.C.A. (CCH) ¶ 14,509 (1980). See also McDonnell Douglas Corp., 80-1 B.C.A. (CCH) ¶ 14,223 (1979).

[46] 80-2 B.C.A. (CCH) ¶ 14,508, at 71,517.

[47] Id.

[48] This action was a violation of the CAS Board's own policy with regard to its relationship to the ASBCA and the contract dispute resolution process. The CAS Board's statement of policy regarding interpretation had recognized "the existence of

(continued...)

The ASBCA had occasion to consider the CAS Board's action on reconsideration in McDonnell Douglas. The ASBCA not only did not adopt the CAS Board's interpretation of CAS 403, but also sharply questioned both the authority of the Board to issue interpretations, in the absence of express statutory authorization, and the validity and effect of extant interpretations. The ASBCA stated, flatly, "[w]e do not consider Interpretation No. 1 as a permissible 'short-cut'" to the prescribed procedural process needed to change standards.[49] In ASBCA's view, the CAS Board's general grant of authority did not include "authority to issue interpretations" to issue or modify cost accounting standards.[50] Interpretation No. 1, therefore, was not binding or determinative as to the proper interpretation of CAS 403.

As one might expect, the ASBCA has been even more skeptical of informal interpretations by the CAS Board. In Ford Aerospace and Communications Corp., Aeronutronic Division ("Ford Aerospace"),[51] the ASBCA rejected the government's argument that an informal interpretation (the minutes of a Board meeting endorsing a DOD Working Group Paper) was entitled to

---

48/ (...continued)
contractual and administrative provisions for the resolution or settlement of disputes arising under a contract. . . ." Restatement. The Board had also stated that it "will not intervene in or seek to supersede such provisions." Id.

[49] McDonnell Douglas Corp., 80-2 B.C.A. (CCH) ¶ 14,508, at 71,518.

[50] Id. See 50 U.S.C. app. § 2168(i) (1970).

[51] Ford Aerospace and Communications Corp., Aeronutronic Division, ASBCA No. 23833, 83-2 B.C.A. (CCH) ¶ 16,813 (1983).

"'substantial deference'" where it conflicted with what the ASBCA termed "a plain reading of CAS 410" regarding allocation bases.[52]

As history demonstrates, the old CAS Board, litigants, and even the ASBCA,[53] have searched for articulations of the meaning of CAS where a standard is not susceptible to "plain meaning." The ASBCA's lengthy discussion of the intent behind CAS 410 in Ford Aerospace suggests that there is a great deal of interest in knowing what the CAS Board thinks about the CAS. It appears that "widespread and serious questions," to borrow the old CAS Board's language, of the CAS Board's intentions will inevitably arise. However, the issue of whether a new CAS Board should have authority to issue interpretations is one on which there is a substantial diversity of views.[54]

One view is that an expeditious, meaningful administrative mechanism for obtaining authoritative responses to CAS questions could assist contractors in resolving questions of regulatory application in light of, for example, changes in procurement priorities,[55] and perhaps avoid litigation over CAS issues before the BCAs and the courts. However, if Congress permits the CAS Board to issue interpretations, it should appropriately define the Board's authority to do so in order to avoid controversies such as those which arose out of interpretations issued by the former Board. In that regard, the criteria articulated by the old CAS Board for issuing interpretations provide a generally appropriate model. That is, CAS Board interpretations should address "widespread serious questions of [its] intention or meaning in its promulgation," within the limits imposed by the jurisdiction and prerogatives of the courts and the boards of contract appeals.

---

[52] Id. at 83,621.

[53] Cf. Ford Aerospace, 83-2 B.C.A. (CCH) ¶ 16,813.

[54] H.R. 3345 would permit the CAS Board to issue "interpretations" of the cost accounting standards. See H.R. 3345 § 26(f)(1).

[55] For example, recent controversy over allocation of IRAD versus contract costs and the accompanying issues raised by recent DOD emphasis on having contractors "share" development costs are areas where a view from the CAS Board might avoid costly battles between contractors and government auditors. See
(continued...)

In particular, as the old CAS Board's criteria provided, interpretations by a new CAS Board should be available only upon requests having some degree of formality.[56] Moreover, while such interpretations should be entitled to the degree of

---

[55] (...continued) USAF, Navy Carefully Craft ATA, ATF Contracts To Allow For Huge IRAD Supplement, Inside the Pentagon, June 19, 1987; Hill, IR&D - A Continuing Dilemma, 47 FCR 509, 510-11 (1987).

[56] The notice and comment procedures specified in the Brooks Bill, H.R. 3345 § 26(h), do not apparently apply to issuance of interpretations by the Board. (The procedures specified in H.R. 3345 § 26(h) are discussed in more detail in § D.6., below.) This distinction mirrors that applicable to interpretations and rulemaking for agencies subject to the Administrative Procedures Act. See 5 U.S.C. § 553 (1966); see also Herron v. Heckler, 576 F. Supp. 218, 231 (N.D. Cal. 1983), where the court defines "interpretive rule" to be: "an administrative construction of a statutory provision . . . They clarify and explain existing law or regulations . . . ." K. Davis, Administrative Law Text § 5.03 at 126-131 (3d ed. 1972).

deference typically accorded administrative agency opinions,[57] they should not preclude a contractor (or the government) from litigating questions of regulatory understanding and application before the courts or the boards of contract appeals.[58] In that regard, interpretations should not be issued to "intervene in" or seek to "supersede" proceedings pursuant to contractual and administrative dispute provisions. Thus, as the former CAS Board's experience with CAS 403 suggests, requests for interpretation should be denied where a dispute is pending before a proper court or BCA.[59] Likewise, where the CAS Board concludes that a court or board has not properly construed a standard, it should address that through formal modification to the standard rather than by interpretation.

---

[57] See 5 K. Davis, Administrative Law Treatise § 29:16 (2d ed. 1984); cf. Ford Aerospace, 83-2 B.C.A. (CCH) ¶ 16,813, at 83,621 (refusing to "accord the original guidance and the cost Accounting Standards Board minutes 'substantial deference'"). See also Bowsher v. Merck & Co., 460 U.S. 824 (1983) (rejecting GAO's position on access to contractor records where it did not reflect a "consistent and longstanding interpretation of its authority under the access-to-records statutes" and was inconsistent with the statutory language). C.f. Ford Aerospace, 83-2 B.C.A. (CCH) ¶ 16,813 (no deference to interpretation that conflicts with plain meaning of CAS).

[58] In addition, contractors who relied on inconsistent applications or understanding of CAS might have equitable grounds to sustain their accounting practices. See generally, FMC Corp., ASBCA No. 30130, 87-2 B.C.A. (CCH) ¶ 19,791 (1987); Data-Design Laboratories, ASBCA No. 27245, 86-2 B.C.A. (CCH) ¶ 18,830 (1986); Sanders Associates, ASBCA No. 15518, 73-2 B.C.A. (CCH) ¶ 10,055 (1973).

[59] S. 852 in comparison would require the boards of contract appeals to refer questions of interpretation to the Administrator and for that interpretation to become part of the judicial record and considered by the BCAs. See S. 852 § 103(m).

On the other hand, we also note that some commentators have expressed substantial concern regarding the potential adverse impact on contractors' cost allocation systems and practices from CAS Board interpretations that could be given retroactive effect.[60] As a result, some strongly maintain that a CAS Board should not have authority to issue interpretations.[61] Rather, if the Board believes a cost accounting standard needs clarification or amplification or disagrees with the construction of a standard by a board or court, the Board should modify or amend the standard and such action should have only prospective effect.[62]

In summary, we note that there is a divergence of views on whether the CAS Board should have authority to issue interpretations and that the Council has expressed the view that H.R. 3345 should be silent on this issue.

---

[60] See Statement of Clarence T. Kipps, 1984 Hearings, at 59-60; NSIA Statement, 1984 Hearings, at 85-86. See also Aerospace Industries Association of America, Inc., Proposed AIA Position on CAS Legislation at 2-3 (1984).

[61] It has also been suggested that the composition of the CAS Board is likely to change between original promulgation of a standard and the time at which questions of interpretation arise. Thus, subsequent interpretations of standards are not likely to reflect the understanding and intention of the Board at the time a standard was originally adopted.

[62] See Statement of Clarence T. Kipps, 1984 Hearings, at 59-60; NSIA Statement, 1984 Hearings, at 85-86. See also Aerospace Industries Association of America, Inc., Proposed AIA Position on CAS Legislation at 2-3 (1984).

B. Constitutional Considerations And Limitations

The formation of the original CAS Board raised four constitutional questions that must be considered in assessing legislation to establish a new Board.

First, the method by which the original Board members were appointed was constitutionally suspect. Under Pub. L. No. 91-379, the Board members were appointed by the Comptroller General, an official of the legislative branch.[63] Under the Supreme Court's holding in Buckley v. Valeo, 424 U.S. 1 (1976), policy making officials are "officers of the United States" and, under the Constitution, must be appointed by the President with the advice and consent of the Senate.[64]

In light of Buckley, it is entirely possible that the manner of appointment of the original CAS Board would be held unconstitutional.[65] Thus, the members of any new Board should be subject to appointment by the President.

Second, Pub. L. No. 91-379 mandated that all CAS standards be presented to Congress for further review. Although it never did so, Congress had authority to legislatively veto any of the Board's standards. Pub. L. No. 91-379 §(h)(3). A similar legislative veto provision was declared unconstitutional in Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983). Although Chadha could potentially be distinguished,[66] it is probable that the legislative veto provision in the CAS statute would not fare any better than the analogous provision in the statute at issue in that case.

---

[63] See Bowsher v. Synar, 106 S. Ct. 1181 (1986).

[64] In Buckley, members of the Federal Election Commission were appointed by the President, the Speaker of the House, or the President Pro Tempore of the Senate. None of these appointments were made "with the advice and consent of the Senate."

[65] Buckley could be distinguished on the ground that the Controller General is appointed by the President and that the other members of the CAS Board could be seen as officials appointed to the Controller General's "staff." However, the Controller General has been deemed to be a legislative official and, in any case, the other Board members were given equal policy making authority.

Given the unconstitutionality of the legislative veto, any congressional disapproval of a new CAS Board's actions would have to be in the form of separate legislation that is submitted to the President for signature or veto.[67]

A third potential constitutional issue concerns the delegation of legislative powers. Pub. L. No. 91-379 delegated authority to issue cost accounting standards to the Board. Congress could have, had it wished, retained this authority itself and passed the standards in the form of a statute. Although the Supreme Court has greatly expanded Congress's authority to delegate its legislative authority,[68] the Court has been less willing to allow Congress to delegate such authority to any agency of the legislature.[69]

---

[66] The legislative veto exercised in Chadha overturned an executive branch immigration decision. The CAS Board was, on the other hand, set up as an agency of the legislative branch. Thus, it is arguable that Congress maintains the power to legislatively veto actions of its own agencies. An analogy could be drawn between a congressional override of a CAS Board promulgation and a decision of the full Senate to reject an action of one of its committees. Again, however, this argument is unlikely to prevail because of the CAS Board's independent authority to issue regulations that have, without congressional approval, "the force and effect of law."

[67] The existence of the unexercised legislature veto provision in the statute, alone, presumably would not make the CAS Board, and, hence, its standards unconstitutional. Approximately 200 statutes that contain a legislative veto remain on the books and are followed.

Finally, the original Cost Accounting Standards legislation delegated what could be considered regulatory authority to a legislative official, the Comptroller General. The Supreme Court's decision in Bowsher v. Synar demonstrates the inherent constitutional difficulties that exist with any attempt to create a CAS Board with regulation-making authority within the legislative branch. There the Comptroller General's authority to issue binding budget orders was declared to be unconstitutional because it impermissibly involved Congress in execution of the law -- a function reserved for the executive branch. Likewise, a regulation promulgated by an official of the legislative branch which requires the executive branch to procure the materials and services from contractors who conform to the prescribed procedures could be seen as an unconstitutional interference with executive branch functions unless it results directly from duly passed legislation. Although the authority to make mandatory budget decisions can be distinguished from the authority to establish uniform accounting regulations, the Synar decision is likely to be given a broad reading.[70]

---

[68] See, e.g., Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

[69] See Chadha, 462 U.S. at 944-59 (legislative veto is impermissible delegation of legislative authority to one house of Congress).

In all, it is likely that the old CAS Board would be held constitutionally defective. It is also probable that the cost accounting standards promulgated by the Board would be held to be de facto valid for a reasonable period of time after a decision on their constitutionality.[71] However, H.R. 3345 would place the new CAS Board in the executive branch and thus avoid these troubling questions.[72]

C. The Role Of The CAS Board In The Determination Of The Allowability Of Contract Costs

The Brooks Bill would significantly expand jurisdiction of the CAS Board by giving it authority "to make, promulgate, amend, rescind, and enforce ... the cost principles governing allowability of costs on contracts with the United

---

[70] The constitutional validity of the original CAS Board structure is nonetheless not settled. The Comptroller General's authority to issue stays in bid protests was upheld by the Third Circuit Court of Appeals in Ameron, Inc. v. United States Army Corps. of Engineers, 809 F.2d 979 (3d Cir. 1986); petition for cert. filed (July 27, 1987). In Ameron, the court pointed out that the Comptroller General's authority to issue stays was not an interference in the Executive Department's conduct of its duties because the bid protest process was a method of reporting to Congress on the enforce-ability of, and compliance with, its procurement statutes. On the other hand, unlike the bid protest at issue in Ameron, the Cost Accounting Standards are issued as regulations that are binding upon government agencies.

[71] See Buckley; Boeing I.

[72] S. 852 provides that proposed standards are to be transmitted to Congress and that such standards are not to take effect for 90 days thereafter. However there is no explicit provision for a legislative veto. See S. 852 § 103(d).

States."[73] This would place policy questions of what the Government will pay for its goods and services in a forum that has a distinct accounting cast.[74] We would like briefly to set the terms for this important debate, provide a short history and analysis of the issues, and conclude with a few suggestions for possible changes to the Brooks Bill.

The first question to be addressed is whether there is a material difference between "allowability" and "allocability." The CAS Board's regulations define allocability through a definition of the process of allocation:

> Allocation of cost to cost objectives includes both direct and indirect allocation of cost. Examples of cost accounting practices involving allocation of cost to cost objectives are the accounting methods or techniques used to accumulate cost, to determine whether a cost is to be directly or indirectly allocated, to determine the composition of cost pools, and to determine the selection and composition of the appropriate allocation base.[75]

Allocability, therefore, is the fundamental mechanics of an accounting system to assign costs to proper cost objectives. FAR 31.201-2 defines allowability in terms of five "factors," one of which is allocability.[76] A cost is allowable, in other words, if it is allocable and meets the other criteria of reasonableness, CAS compliance, contract terms, and the limitations imposed by the cost principles in part 31.

---

[73] H.R. 3345, § 26(f)(1).

[74] Two of its seven members would be CPAs. If, for example, the industry and government representatives were to deadlock on the allowability of a cost, the accountants would be the decisive voice on a matter that may not involve a pure accounting question.

[75] 4 C.F.R. 331.20(k)(3) (1987); see also 4 C.F.R. 400.1 and 402.30(a)(1) (1987).

Allocability, as FAR 31.101-2 makes plain, is therefore inseparable from allowability. A cost cannot be allowable unless it is allocable, but not all allocable costs are allowable. To the old CAS Board, here accounting stops and policy begins. In disclaiming authority to decide allowability, the CAS Board defined the concept in terms of policy and politics:

> Allowability is a procurement concept affecting contract price and in most cases is established in regulatory or contractual provisions. An agency's policies on allowability of costs may be derived from law and are generally embodied in its procurement regulations. A contracting agency may include in contract terms or in its procurement regulations a provision that it will refuse to allow certain costs . . . that are

---

[76] FAR 31.201-4 defines allocable costs as follows:

> A cost is allocable if it is assignable or chargeable to one or more cost objectives on the basis of relative benefits received or other equitable relationship. Subject to the foregoing, a cost is allocable to a Government contract if it --
>
> (a) Is incurred specifically for the contract;
> (b) Benefits both the contract and other work, and can be distributed to them in reasonable proportion to the benefits received; or
> (c) Is necessary to the overall operation of the business, although a direct relationship to any particular cost objective cannot be shown.

> unreasonable in amount or contrary to public policy.[77]

The CAS Board's view contains the significant point that allowability is a function of the decisions by the procuring agencies on whether to reimburse contractors for a particular cost.

A clear separation of policy questions (allowability) and accounting procedure (allocability) ought to be possible, but recent experience teaches otherwise. Moreover, the incorporation of CAS into FAR on September 30, 1987, further undermines attempts to keep the two apart.

There appears to be three reasons for the collapse of a clear distinction between allowability and allocability. First, a determination of "benefit" is the key to assigning costs to cost objectives and also can be determinative of whether a cost is allowable under a particular cost objective. The cost accounting standards require a causal/beneficial test to determine to what cost objective a cost is allocable. Costs are allocable to cost objectives benefited by the costs. Similarly a cost pool will be spread over a base having the required or appropriate causal and beneficial relation to the costs in the pool.[78] "Benefit" has been defined in broad accounting terms, with significant effects on what the government will have to pay on its contracts.[79]

---

[77] CAS Board, Restatement.

[78] *See* CAS Board Restatement, where the CAS Board defined its causal/beneficial relationship test.

The second basis for the collapsing of allowability and allocability is that cost accounting -- the "measuring, assigning and allocating" of costs[80] -- will effectively determine what the government will pay for its goods and services. Of course, contractual terms and the cost principles will be constraints on the government's liability for costs, but the battle over allowable costs is often fought and decided under the terms of the cost accounting systems that price the goods and services and justify claims for reimbursement. As between government contractors and government auditors, issues of whether a cost is allowable in overhead or particular contracts are often framed (and decided) in terms of whether a cost is allocable or an accounting method is proper.

Finally, a wooden separation of allowability and allocability can be analytically and practically impossible. For example, the ASBCA was forced to recognize in Boeing II a situation where an accounting rule and a cost principle addressed the same subject matter and led to radically different results for the government's payment obligation.[81] Likewise, the FAR has always incorporated the most significant CAS principles, which indicates that there is no practical separation of allowability and allocability. Part 31 reiterates the CAS rules for defining direct and indirect costs, for maintaining consistency in accumulation and reporting of costs, and for accounting for unallowables. These principles are the heart of cost accounting standards, which aim to establish visibility and consistency of government contract costs.82/

---

[79] See, e.g., Lockheed Aircraft Corp. v. United States, 375 F.2d 786 (Ct. Cl. 1967); General Dynamics Corp., Electric Boat Division, ASBCA No. 18503, 75-2 B.C.A. (CCH) ¶ 11,521 (1975), aff'd on reconsideration, 76-1 B.C.A. (CCH) ¶ 11,743 (1976).

[80] Boeing II, 85-3 B.C.A. (CCH) ¶ 18,435 at 92,607.

[81] See id.

The Brooks Bill implicitly recognizes the coupling of allowability and allocability by giving the new CAS Board regulatory authority over both. But should a CAS Board be the arbiter of allowability issues, where policy and not accounting is the principal factor? The old CAS Board declined to extend its overall authority over CAS to encompass allowability out of deference to the procuring agencies. These remain strong concerns. As the old CAS Board indicated, the procuring agencies ought to decide what costs they want to pay for (within statutory limits), for example, whether they want to pay interest on debt, selling costs, or other specific costs in Part 31 -- however strong the "benefit" or the accounting logic might be in favor of assigning the cost to government contracts. This critical view suggests that proposals to extend a CAS Board's authority to encompass the cost principles should include provision for some form of oversight at the policy level, while recognizing that on

---

82/ See FAR 31.201-6, -7; FAR 31.202, .203. In addition, a number of individual cost principles incorporate or effectively apply specific CAS or portions of particular CAS for purposes of determining allowability. See, e.g., FAR 31.205-6 and CAS 412, 413 and 415; FAR 31.205-10, -11, -18, and -19 and CAS 404, 409, 414, 416, 417, and 420.

other levels, a CAS Board should be competent to resolve issues of allowability.

One approach to accommodation of the competing concerns might be to change the composition of the proposed CAS Board to eliminate the accounting "cast" and render the Board capable of dealing with the policy questions in a neutral fashion. The accounting profession would remain a valuable consultant to (or perhaps have representation on) the CAS Board, but as a statutory matter, members of the Board would be selected for broad abilities and experience in industry and government. Thus, the legislation might spell out certain necessary qualifications of the Board members to ensure that these qualifications are adequate to meet the tasks assigned to the new CAS Board. At the same time, the Administrator would have discretion to determine whether and how these qualifications are met through the appointment process.

An alternative approach to satisfy the concerns would be to establish the OFPP Administrator as a check and balance to the CAS Board when policy questions are at the core of a Board action. Under the Brooks Bill as currently drafted, the Administrator chairs the CAS Board, but does not have independent power over any particular issues. It would be consistent with the overall structure of the Bill to give the Administrator authority to review decisions to alter the cost principles where policy concerns are central.[83] The Administrator's review might be set up as appropriate where the CAS Board has decided that a cost is allowable or unallowable irrespective of accounting treatment.[84]

D. Overview Of Other Provisions Of The Brooks Bill Relating To CAS

Some of the other more significant provisions of the Brooks Bill relating to the authority and operation of the CAS Board are identified below and, where appropriate, commented on.

1. Contract Coverage

Under the Bill, the cost accounting standards and cost principles would also be mandatory for use by all executive agencies and contractors and subcontractors in negotiated contracts in excess of $100,000. *See* H.R. 3345 § 26(f)(2). It may, however, be appropriate to consider whether the $100,000 threshold should be increased.

---

[83] Under the Brooks Bill, the OFPP Administrator is charged with providing "overall direction of procurement policy" and with "prescrib[ing] . . . policies, regulations . . . relating to procurement as the Administrator determines are appropriate." H.R. 3345 § 6(a).

[84] A complete definition of the jurisdiction and scope of the Administrator's review would need to be determined. However, a conceptualization of the jurisdictional distinction between policy and other questions of allowability would be that between a change to a cost principle that only limits a category of costs, such as the recent amendment to the selling cost principle, and a change that adds or subtracts a whole category of cost without regard to the other tests for allocability and allowability. *Cf*. Defense Procurement Improvement Act of 1985, Pub. L. No. 99-145 § 911, 99 Stat. 683 (1985).

2. Exceptions to Contract Coverage

Section 26(f)(2) of H.R. 3345 provides exceptions to contract coverage for negotiated contracts priced on the basis of (a) established catalog or market prices of commercial items sold in substantial quantities to the general public; and (b) prices set by law or regulation. These two exceptions were also in Pub. L. No. 91-379. However, we believe the rationale for excluding those types of contracts applies with equal force to contracts exempted under Pub. L. No. 87-653 on the basis of adequate price competition (perhaps more accurately described as contracts for which no cost data is required to be submitted).

3. Disclosure and Contract Price Adjustments

The Brooks Bill provides for disclosure of accounting practices and contract price adjustments for increased costs to the government from an accounting practice change, or failure to comply with applicable standards.[85] "Increased costs" is statutorily defined, incorporating the definition at 4 C.F.R. ¶ 331.70(a) (1987). In addition, the Bill provides that

> [a]ny contract price adjustment undertaken pursuant to paragraph (1)(B) on a firm fixed price contract shall be made only when the contractor makes a change in its cost accounting practices of which it was aware or should have been aware at the time of the price negotiation and which it failed to disclose to the Government.[86]

---

[85] *See* H.R. 3345 § 26 (g)(1) & (2). Price adjustments are to be made with interest at a rate established under 26 U.S.C. § 6621.

[86] H.R. 3345 § 26(g)(3).

This appears to limit CAS related price adjustments on firm fixed price contracts to changes in accounting practices which otherwise constitute defective pricing.

4. Disputes

The Bill provides that disputes regarding compliance "with cost accounting standards, the rules and regulations . . . and cost adjustments demanded by the United States" are subject to the Contract Disputes Act. H.R. 3345 § 26(g)(4).

5. Exemptions and Waivers

The Board is authorized to issue exemptions and waivers. H.R. 3345 § 26 (f)(5)(A), (B).

6. Procedures

The Brooks Bill specifies procedures to be used in promulgating "rules, regulations, cost accounting standards, costs principles and modifications thereof." H.R. 3345 § 26(h)(1). Prior to promulgating a "standard," the Administrator and the Board are required to "take into account" (1) the probable costs and benefits of implementing the standard;87/ (2) "the advantages, disadvantages, and improvements

---

87/ The original CAS legislation included a similar cost-benefit provision. The Board noted that although this requirement was taken seriously, determinations of costs and benefits were difficult because of the difficulty of accurately quantifying the benefits of the standards. See Restatement. See also Report to the Cost Accounting Standards Board by a Special Group of Consultants to Consider Issues Relating to Comparison of (continued...)

anticipated in the pricing, administration, and settlement of contracts," and (3) "the scope of, and alternatives available to, the action proposed to be taken."[88]

The Brooks Bill exempts the CAS Board from the Administrative Procedure Act ("APA") requirements.[89] This exemption of the CAS Board from the APA has been questioned. However the substitute requirements imposed by H.R. 3345 § 26(h)(1) (discussed above) appear to exceed the APA requirements insofar as notice and comment opportunities are concerned, and it is not clear that the substitute requirements - contained in the Brooks Bill fail to provide adequate due process.[90] Moreover, the original CAS was also exempted from the operation of the APA and there does not appear to be any substantial body of opinion within the legal community that due

---

87/ (...continued)
Cost With Benefits (Nov. 13, 1978) (reprinted in 763 FCR E-5 (1979)). There were, however, some who criticized the Board's performance in this regard. See 805 FCR A-22 (1980).

[88] H.R. 3345 § 26(h)(1)(A),(B). Section 26(h)(1)(A) provides that the Administrator and the Board are to "take [the enumerated factors] into account, after consultation and discussions with the Comptroller General and professional accounting organizations, contractors and interested parties" (emphasis added). As drafted, the Bill arguably requires those consultations and discussions to take place prior to the Board's publication of its report on the issues and accompanying notice of proposed rule making. See also H.R. 3345 § 26(h)(c)(iii) requiring the Board "during [the] 60-day [comment] period, to consult with the Comptroller General and consider any recommendation . . . [he] may make." (Emphasis added.)

[89] See H.R. 3345 § 26(h)(3).

[90] It has been suggested, however, that if the CAS Board was subject to the APA, it might facilitate judicial review of allegedly improper standards.

process was not adequately served by the procedures followed by the original CAS Board.

7. Effective Dates

H.R. 3345 § 26(h)(2) requires that "[r]ules, regulations, cost accounting standards, cost principles, and modifications thereof" shall be implemented no later than the beginning of the contractor's next fiscal year. This may pose practical problems, at least with respect to new Standards. The original CAS wrote an implementation date into each standard, geared to the requirements of that particular standard. CAS 418, for instance, required comprehensive review of a contractor's cost allocation practices and potentially comprehensive changes, and for that reason the implementation date was fixed as no later than the start of the contractor's second fiscal year following CAS 418's effective date. The new statute should either fix the second fiscal year as the outside time for implementation, or leave implementation dates to the new CAS Board.

8. Access to Records

Like Pub. L. No. 91-379, the Brooks Bill provides a right of access to records "[f]or the purpose of determining whether a contractor . . . has complied with . . . [the] cost accounting standards and has followed . . . his disclosed cost-accounting practices." H.R. 3345 § 26(k). The Inspector Generals are included among those granted a right of access under the Bill.

Appendix A

GUIDELINES FOR LEGISLATION ON ESTABLISHMENT OF A COST ACCOUNTING STANDARDS BOARD

- Locate CAS Board within the Executive Branch and, in particular, within OFPP. Placement of the Board within OFPP must be accompanied by increases in the staff of that office to ensure that this new responsibility can be met without an intolerable resource drain;
- Establish a reconstituted CAS Board with authority to promulgate new cost accounting standards, if necessary; to modify and grant exemptions and waivers from the previously established standards on cost allocability;
- Broaden [the] scope of CAS Board authority to include respon-sibility for establishing standards and methods for determining cost allowability, but recognize policy authority of agency (at high Secretarial level) to establish which costs are allowable and to request CAS Board development of government-wide accounting standards to implement such policies;
- Recognize CAS Board authority to modify or change standards prospectively in response to other forces, e.g., decisions of Boards of Contract Appeals, courts, industry initiatives, contracting officers' analyses;
- Modify CAS Board authority to exclude from the cost accounting standards negotiated contracts that are priced on the basis of adequate price competition;
- Reconsider composition, qualifications and additional governmental representation among CAS Board representatives

in light of Board's jurisdiction over both procurement policy and cost accounting issues; and

Adopt procedures for notice and public comment in connection with the promulgation of rules, regulations, cost accounting standards, cost principles and modifications by the CAS Board. Although promulgations of CAS Board are proposed to be exempt from judicial review under APA, this legislation should make clear that administrative due process is required. Moreover, judicial review is provided for contract disputes arising out of the application of the cost accounting standards under the Contract Disputes Act.

Appendix B

H.R. 3345

Section 5

SEC. 5. COST ACCOUNTING STANDARDS BOARD.

The Office of Federal Procurement Policy Act is further amended by adding at the end thereof the following:

``COST ACCOUNTING STANDARDS BOARD

``SEC. 26. (a)(1) There is established within the Office of Federal Procurement Policy an independent board to be known as the ``Cost Accounting Standards Board'' (hereinafter referred to as the `Board') which shall consist of 7 members, including the Administrator, who shall serve as Chairman, and

6 members appointed as follows:

``(A) 2 representatives of the Federal Government--

``(i) 1 of whom shall be a representative of the Department of Defense and be appointed by the Secretary of Defense; and

``(ii) 1 of whom shall be a representative of civilian agencies and be appointed by the head of a civilian agency designated by the Administrator;

``(B) 2 representatives of industry, each of whom shall be appointed by the Administrator, and--

``(i) 1 of whom shall have substantial experience regarding finance; and

``(ii) 1 of whom shall have substantial experience regarding acquisition and contracting; and

``(C) 2 certified public accountants from independent public accounting firms, each of whom shall be appointed by the Administrator and shall have substantial experience regarding the accounting problems of Government contractors, including contractors that are small businesses.

``(2)(A) The term of office of each of the members of the Board, other than the Administrator of the Office of Federal Procurement Policy, shall be 4 years, except that--

``(i) any member appointed to fill a vacancy in the Board shall serve for the remainder of the term for which his predecessor was appointed; and

``(ii) no individual who is appointed under paragraph (1)(A) of this subsection shall continue to serve after ceasing to be an officer or employee of the Government.

``(B) A vacancy on the Board shall be filled in the same manner in which the original appointment was made.

``(C) The initial members of the Board shall be appointed within 90 days after the date of enactment of this section.

``(3) Each member of the Board appointed from private life shall receive compensation at a rate not to exceed the daily equivalent of the rate prescribed for level IV of the Executive Schedule for each day (including travel time) in which the Member is engaged in the actual performance of duties vested in the Board.

``(b) The Board shall have the power to appoint, fix the compensation of, and remove an executive secretary and two additional staff members without regard to chapter 51, subchapters III and VII of chapter 53, and chapter 75 of title 5, United States Code, and those provisions of such title relating to appointment in the competitive service. The executive secretary and the two additional staff members may be paid compensation at rates not to exceed the rates prescribed for levels IV and V of the Executive Schedule, respectively (5 U.S.C.A. 5315, 5316).

``(c) The Board is authorized to appoint and fix the compensation of such other personnel as the Board deems necessary to carry out its functions.

``(d) The Board may utilize personnel from the Federal Government (with the consent of the head of the agency concerned) and appoint personnel from private life without regard to chapter 51, subchapters III and VII of chapter 53, and chapter 75 of title 5, United States Code, and those provisions of such title relating to appointment in the competitive service, to serve on advisory committees and task forces to assist the Board in carrying out its functions and responsibilities under this section.

``(e) Except as otherwise provided in subsection (a), members of the Board and officers or employees of other agencies of the Federal Government utilized under this section shall receive no compensation for their services as such but shall continue to receive the compensation of their regular positions. Appointees under subsection (d) from private life shall receive compensation at rates fixed by the Board, not to exceed the daily equivalent of the rate prescribed for level V of the Federal Executive Salary Schedule (5 U.S.C.A. 5316) for each day (including travel time) in which they are engaged in the actual performance of their duties as prescribed by the Board. While serving away from their homes or regular place of business, Board members and other appointees serving on an intermittent basis under this section shall be allowed travel expenses in accordance with section 5703 of title 5, United States Code.

``(f)(1) The Board shall have the exclusive authority to make, promulgate, amend, rescind, and enforce cost accounting standards, cost principles, and interpretations thereof designed to achieve uniformity, consistency, and equity in the cost accounting standards governing measurement, assignment, and allocation of costs to contracts with the United States and the cost principles governing allowability of costs on contracts with the United States.

``(2) Duly promulgated cost accounting standards and cost principles shall be mandatory for use by all executive agencies and by contractors and subcontractors in estimating, accumulating, and reporting costs in connection with pricing, administration, and settlement of all negotiated prime contract and subcontract procurements with the United States in excess of $100,000, other than contracts or subcontracts where the price negotiated is based on (A) established catalog or market prices of commercial items sold in substantial quantities to the general public, or (B) prices set by law or regulation.

``(3) Costs which are the subject of cost accounting standards or cost principles promulgated by the Board shall not be subject to regulations established by any executive agency that differ from such standards or principles, by being either inconsistent or more or less restrictive. In any case in which any such regulation established by an executive agency is determined to differ from cost accounting standards or cost principles promulgated by the Board, contracts and subcontracts subject to the conflicting regulations shall be deemed to be controlled only by the cost accounting standards or cost principles promulgated by the Board.

``(g)(1) The Administrator, after consultation with the Board, shall have the exclusive authority to make, promulgate, amend, rescind, and enforce rules and regulations for the implementation of cost accounting standards or cost principles promulgated under subsection (f). Such regulations shall require contractors and subcontractors as a condition of contracting with the United States to--

``(A) disclose in writing their cost accounting practices, including methods of distinguishing direct costs from indirect costs and the basis used for allocating indirect costs; and

``(B) agree to a contract price adjustment, with interest, for any increased costs paid to such contractor by the United States.

``(2) The term `increased costs paid by the United States', as that term is used in paragraph (1)(B), shall be deemed to have resulted whenever the costs paid by the United States result from a change in the contractor's cost accounting practices or from a failure to comply with applicable cost accounting standards, and such costs are higher than they would have been had the cost accounting practices not been changed or had the applicable cost accounting standards been complied with by the contractor.

``(3) Any contract price adjustment undertaken pursuant to paragraph (1)(B) shall be made, where applicable, on relevant contracts between the United States and the contractor that are subject to the cost accounting standards and cost principles so as to protect the United States from payment, in the aggregate, of increased costs. Any contract price adjustment undertaken pursuant to paragraph (1)(B) on a firm fixed price contract shall be made only when the contractor makes a change in its cost accounting practices of which it was aware or should have been aware at the time of the price negotiation and which it failed to disclose to the Government.

``(4) The interest rate applicable to the price adjustments shall be the annual rate of interest established under section 6621 of the Internal Revenue Code of 1986 (26 U.S.C. section 6621) for such period. Such interest shall accrue from the time payments of the increased cost were made to the contractor or subcontractor to the time the United States receives full compensation for the price adjustment. If the parties fail to agree as to whether the contractor or subcontractor has complied with cost accounting standards, the rules and regulations relating thereto, and cost adjustments demanded by the United States, such disagreements will constitute a dispute under the Contract Disputes Act (41 U.S.C. 601).

``(5) The Board is authorized--

``(A) to exempt classes or categories of contractors and subcontractors from the requirements of this section; and

``(B) to establish procedures for the waiver of the requirements of this section with respect to individual contractors and subcontractors.

``(h)(1) Prior to the promulgation under this section of rules, regulations, cost accounting standards, cost principles, and modifications thereof, the Administrator and the Board shall--

``(A) take into account, after consultation and discussions with the Comptroller General and professional accounting organizations, contractors, and other interested parties--

``(i) the probable costs of implementation, including inflationary effects, if any, compared to the probable benefits;

``(ii) the advantages, disadvantages, and improvements anticipated in the pricing, administration, and settlement of contracts; and

``(iii) the scope of, and alternatives available to, the action proposed to be taken;

``(B) prepare and publish a report in the Federal Register on the issues reviewed under paragraph (1)(A);

``(C)(i) publish an advanced notice of proposed rulemaking in the Federal Register in order to solicit comments on the report prepared pursuant to subsection (h)(1)(B);

``(ii) provide all parties affected a period of not less than 60 days after such publication to submit their views and comments; and

``(iii) during this 60-day period, consult with the Comptroller General and consider any recommendation the Comptroller General may make; and

``(D) publish a notice of proposed rulemaking in the Federal Register and provide all parties affected a period of not less than 60 days after such publication to submit their views and comments.

``(2) Rules, regulations, cost accounting standards, cost principles, and modifications thereof promulgated by the Administrator or the Board shall have the full force and effect of law, and shall become effective no sooner than 120 days after publication in the Federal Register in final form. Implementation dates for contractors and subcontractors will be determined by agreement with the cognizant Federal agency, but in no event later than the beginning of the contractor's or subcontractor's next fiscal year. Rules, regulations, cost accounting standards, cost principles, and modifications promulgated by the Administrator or the Board will be accompanied by prefatory comments, and by illustrations where deemed necessary.

``(3) The functions exercised under this section are excluded from the operation of sections 551, 553 through 559, and 701 through 706 of title 5, United States Code.

``(i) The Administrator, after consultation with the Board, shall report to the Congress not later than one year after the date of enactment of this section, and annually thereafter, with respect to the activities and operations of the Board under this section, together with such recommendations as is considered appropriate.

``(j)(1) All cost accounting standards, interpretations, modifications, rules, and regulations duly promulgated by the Cost Accounting Standards Board established pursuant to the amendment made by section 103 of Public Law 91-379 shall remain in effect unless and until amended, superseded, or rescinded by the Administrator or the Board pursuant to this section.

``(2) All cost principles in section 31 of the Federal Acquisition Regulation in effect on the date of enactment of this section shall remain in effect unless and until amended, superseded, or rescinded by the Board pursuant to the authority of this section.

''(3) Existing cost accounting standards and cost principles referred to in paragraphs (1) and (2) shall be subject to the provisions of this Act in the same manner as if promulgated by the Board under this Act.

''(k) For the purpose of determining whether a contractor or subcontractor has complied with duly promulgated cost-accounting standards and has followed consistently his disclosed cost-accounting practices, any authorized representative of the head of the agency concerned, of the offices of inspector general established pursuant to the Inspector General Act of 1978, or of the Comptroller General of the United States shall have the right to examine and make copies of any documents, papers, or records of such contractor or subcontractor relating to compliance with such cost-accounting standards and principles.

''(l) There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this section.''.

SEC. 6. PROCUREMENT INTEGRITY.

The Office of Federal Procurement Policy Act is further amended by adding at the end the following:

''PROCUREMENT INTEGRITY

Appendix C

AMERICAN BAR ASSOCIATION

:TION OF PUBLIC
CONTRACT LAW

1983-84

CHAIRMAN
Thomas E. Abernathy IV
Suite 2600, Harris Tower
'33 Peachtree Street, NE
Atlanta, GA 30043
404/521-3800

CHAIRMAN-ELECT
Ruth C. Burg
ASBCA, Room [illegible]
200 Stovall Street
Alexandria, VA 22332
703/325-[illegible]

VICE-CHAIRMAN
James J. Myers
One Post Office Square
37th Floor
Boston, MA 02110
617/357-6700

SECRETARY
Paul G. Dembling
1111 19th Street, NW
Suite 1000
Washington, DC 20036
202/463-[illegible]

SECTION DELEGATE
Allan J. Joseph
505 Sansome Street
14th Floor
San Francisco, CA 94111
415/[illegible]-2626

DIATE AND PREVIOUS
PAST CHAIRMEN
Robert D. Wallick
...nnecticut Avenue, NW
Fifth Floor
Washington, DC 20036

David L. Hirsch
One Golden Shore
Long Beach, CA 90802

COUNCIL MEMBERS
Donald McL. Davidson
One Union Square
Seattle, WA 98101

C. Stanley Dees
1575 Eye Street, NW
Washington, DC 20005

Donald G. Gavin
8230 Boone Boulevard
Vienna, VA 22180

W. Stanfield Johnson
...nnecticut Avenue, NW
Washington, DC 20036

Donald J. Kinlin
Dept. of the Air Force
AFLC/JAB
...tterson AFB, OH 45433

Clarence T. Kipps, Jr.
655 15th Street, NW
Washington, DC 20005

Raphael [illegible]
304 Colony St[illegible]
...t Hempstead, NY 115[illegible]

Patricia A. Szervo
726 Jackson Place, NW
Washington, DC 20503

Prospero S. Virden, Jr.
7900 Westpark Drive
McLean, VA 22102

...R, PUBLIC CONTRACT
LAW JOURNAL
Matthew S. Simchak
...chusetts Avenue, NW
Washington, DC 20036

...OR, PUBLIC CONTRACT
NEWSLETTER
Marion J. Harty
9926 Rand Drive
Burke, VA 22015

...NG LAWYERS DIVISION
REPRESENTATIVE
Kathleen C. Barger
1776 On the Green
Morristown, NJ 07960

...AW STUDENT DIVISION
REPRESENTATIVE
Jeffrey W. Coleman
...olumbus Avenue South
...inneapolis, MN 55417

...RD OF GOVERNORS
LIAISON
[illegible] Harrell
4200 Republic National
Bank Tower
Dallas, TX 75201

...ON ADMINISTRATOR
Marilyn Neforas
...merican Bar Association
1155 East 60th Street
Chicago, IL 60637
312/947-[illegible]

WRITER'S ADDRESS AND TELEPHONE
Suite 2600, Harris Tower
233 Peachtree Street, N.E.
Atlanta, Georgia 30043
(404) 521-3800

March 23, 1984

The Honorable Mary Ann Gilleece
Deputy Undersecretary
Acquisition Management
Department of Defense
Washington, D.C. 20301

RE: DOD Proposal to Establish a CAS Board

Dear Ms. Gilleece:

The views and comments set forth herein are solely on behalf of the Section of Public Contract Law. These comments have not been approved by the ABA House of Delegates or the Board of Governors of the American Bar Association, and accordingly, they should not be construed as representing the position of the association.

On January 23, 1984, the Department of Defense solicited comments on its proposal to establish a "Costing Accounting Standards" Board within DOD for the purpose of approving modifications and interpretations to the Standards published between 1972-1980 by the former CAS Board. The Public Contract Law Section of the American Bar Association finds no legal authority for the creation of such a Board within the Department of Defense.

Congress created the CAS Board in 1970 largely in response to its perception that the ASPR cost principles were inadequate to assure consistent and equitable pricing of defense contracts. The testimony on which Congress relied in creating the CAS Board and the congressional debates clearly demonstrate that Congress decided to establish an independent agency to write uniform accounting standards because it did not feel that such an agency was proper within the Department of Defense. See, e.g., the Subcomm. on Production and Stabilization of the Sen. Comm. on Banking and Currency, 91st Cong., 2d Sess. 499-500 (1970) (hereafter "Sen. Hearings") and Hearings on H.R. 17880 Before the House Comm. on Banking and Currency, 91st Cong., 2d Sess. 239-40 (1970).

As a result of its findings, Congress created the CAS Board and specifically empowered it to "promulgate cost accounting standards designed to achieve uniformity and consistency in the cost accounting principles followed by defense contractors and subcontractors under Federal contracts." 50 U.S.C. App. Section 2168(g) (emphasis added). A CAS Board within DOD, which would presumably have no control over the defense contracts of such agencies as NASA and the Department of Energy, would endanger those goals of uniformity and consistency in accounting for defense contracts. The same statutory section requires that

> Such promulgated standards shall be used by all relevant Federal agencies and by defense contractors and subcontractors in estimating, accumulating and reporting costs in connection with the pricing, administration and settlement of all negotiated prime contract and subcontract national defense procurements. . . . (emphasis added)

The intent of Congress could not have been clearer. The CAS Board was instructed to promulgate standards designed to achieve accounting "uniformity and consistency". "All relevant Federal agencies", including the Defense Department, are legally bound by the Standards. DOD is clearly precluded from demanding that contractors estimate, accumulate, and report costs in a way that is different from the CAS requirements. The Defense Department cannot arbitrarily choose to overrule the standards which it finds objectionable and require that contractors follow allocation practices which are inconsistent with CAS requirements.

Originally, both DOD and its contractors opposed the creation of an independent CAS Board. Although there are some exceptions, most contractors have found that the Standards are not as bad as they had anticipated. The trauma of reforming their accounting systems is now over. Contractors have found that the Standards are, by and large, fair and equitable to both parties and in accordance with good accounting practices. Most importantly, the fundamental requirement in the Standards -- consistency -- has provided a salutory level of stability and predictability in the cost regulations.

DOD, on the other hand, has become increasingly dissatisfied with the Standards. The areas listed for review in DOD's January 23 proposal make it clear that DOD hopes to change the rules on an ad hoc basis. In many cases, the areas which DOD proposes changes are areas in which DOD argued (and lost) to the CAS Board that the original regulations should have been written differently.

After the CAS Board went out of existence in September, 1980, there were numerous proposals to Congress to transfer the CAS Board authority and function to other organizations. The Department of Defense, in fact, submitted a proposal in August, 1981, proposing that waiver authority be transferred to OMB "because the rules and regulations of the Cost Accounting Standards Board have the full force and effect of law." Congress, after conducting hearings on the matter failed to transfer the CAS Board authority and functions to OMB or any other organization. Unless and until Congress acts to transfer the Board's authority to some other agency, we believe that contractors and the government must continue to abide by the standards written by the Board.

The November 30, 1983 letter from the Justice Department on this subject is not a correct legal interpretation of the authority of the Department of Defense. The Court in The Boeing Company vs. United States, 680 F.2d 132 (Ct.Cl. 1982) clearly and unequivocally refused to "consider or rule upon" the constitutional validity of the Standards. The language quoted in the Justice Department's letter as a basis for permitting DOD to "adopt, reject, or grant exemptions from CAS" without regard to the mandate of Public Law 91-379 relies upon an assumption about the invalidity of the Standards which the Court refused to accept. There is no basis in the Boeing decision for granting to DOD the authority to change the Standards.

There is, therefore, no existing legal authority for the DOD to establish a separate Board to approve and modify cost accounting standards as proposed by DOD.

In certain areas, we understand that it has been the position of DOD in the past that adequate legal ground exists under Public Law 85-804 for allowing DOD to have waiver authority concerning application of the cost accounting standards to specific contracts. You have not asked for comment on that position and we do not believe that it is entirely free of doubt, but there is a respectable legal argument in support of that position. Insofar as the Cost Accounting Standards Board recently proposed by DOD is concerned, however, we do not believe that there is any legal authority for the establishment of such a Board. Should you have any further questions, please feel free to contact me.

Sincerely,

Thomas E. Abernathy, IV

Thomas E. Abernathy, IV

TEA:EP

Appendix D APR 25 1985

merican Bar Association

WRITER'S ADDRESS AND TELEPHONE

1984-85

CHAIRPERSON
Ruth C. Burg
ASBCA, Room 9365
200 Stovall Street
Alexandria, VA 22332
202/325-9520

CHAIRMAN-ELECT
James J. Myers
One Post Office Square
37th Floor
Boston, MA 02109
617/357-8700

VICE-CHAIRMAN
Paul G. Dembling
1111 19th Street, NW
Suite 1000
Washington, DC 20036
202/463-2900

SECRETARY
C. Stanley Dees
1575 Eye Street, NW
Suite 800
Washington, DC 20005
202/789-7625

SECTION DELEGATE
Marshall J. Doke, Jr.
4200 Republic Bank Tower
Dallas, TX 75201
214/742-1021

IMMEDIATE AND PREVIOUS PAST CHAIRMEN
Thomas E. Abernathy, IV
Suite 2800 Harris Tower
233 Peachtree Street, NE
Atlanta, GA 30043

Robert D. Wallick
1250 Connecticut Avenue, NW
Fifth Floor
Washington, DC 20036

COUNCIL MEMBERS
Donald McL. Davidson
One Union Square
Seattle, WA 98171

Martin J. Harty
9506 Rand Drive
Burke, VA 22015

W. Stanfield Johnson
1100 Connecticut Avenue, NW
Washington, DC 20036

Donald J. Kinlin
Dept. of the Air Force
AFLC/JAB
Wright-Patterson AFB, OH 45433

Raphael Mur
Grumman Aerospace Corp
Mail Stop B03-05
Bethpage, NY 11714

John E. Pachter
8230 Boone Boulevard
Vienna, VA 22180

Norman L. Roberts
350 North Crescent Drive
Beverly Hills, CA 90210

Patricia A. Szervo
725 Jackson Place, NW
Washington, DC 20503

Prospero B. Virden, Jr
7900 Westpark Drive
McLean, VA 22102

EDITOR, PUBLIC CONTRACT LAW JOURNAL
Matthew S. Simchak
1001 22nd Street, NW
Washington, DC 20037

EDITOR, PUBLIC CONTRACT NEWSLETTER
Martin J. Harty
9506 Rand Drive
Burke, VA 22015

YOUNG LAWYERS DIVISION REPRESENTATIVE
Alan C. Brown
888 16th Street, NW
Washington, DC 20006

LAW STUDENT DIVISION REPRESENTATIVE
Kathleen T. Schwalm
2221 Overland
Los Angeles, CA 90034

BOARD OF GOVERNORS LIAISON
John H. Neiman
1119 High Street
Des Moines, IA 50309

SECTION ADMINISTRATOR
Marilyn Neforas
American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611
312/988-5596

March 29, 1985

The Honorable Mary Ann Gilleece
Deputy Undersecretary
Acquisition Management
Department of Defense
Washington, D.C. 20301

Re: DoD Proposal to Establish an Internal
Cost Accounting Standards Board

Dear Ms. Gilleece:

The views and comments set forth herein are solely on behalf of the Section of Public Contract Law. These comments have not been approved by the ABA House of Delegates or the Board of Governors of the American Bar Association and, accordingly, they should not be construed as representing the position of the ABA. Based upon our understanding of the status of the proposal, we have the following comments.

The comments provided below are directed to interim action under which DoD established a CAS Policy Group as set forth in the proposal contained in the August 16, 1984, letter to you from James T. Brannan, Director, Defense Acquisition Regulatory System.

Air Force representative Major Thomas Mahler has been named as Acting Chairman of the CAS Policy Group. He will be assisted by representatives of the Army, Navy, DLA and NASA. The members are now assigned part-time, having other primary duties, with the Chairman becoming full-time later in the year. The initial effort of this Policy Group will be to review the FAR Part 30 CAS Procedures and to examine the CAS provisions included in the FAR Part 31 Cost Principles. We believe that it is important for DoD to affirm that the CAS Policy Group and the Cost Principles Subcommittee will maintain independence and have clear and separate lines of responsibility. We also believe that it is important for DoD to clarify whether it contemplates any change in the traditional CAS-directed distinction between allocability and allowability.

We commend the Brannan proposal's two-step public comment process and the demonstrated interest in obtaining the objective, professional input of public advisors from the accounting and academic communities. It is critical, however, to include a broader spectrum of interested and knowledgeable parties; e.g., from industry and the professions, in order to achieve true objectivity. We believe that the role of the public advisors should be formalized to include participation on a regular, ongoing basis rather than on an "as-needed" basis as currently proposed. It is important to the public perception of fairness, as well as to the efficient function of the review process, that there be a coordinated and simultaneous review of proposed regulatory action by government and public consultant groups.

In addition to the concerns identified above, we have formulated the following questions for your review and response.

1. Will the CAS Policy Group issue interpretations as well as revisions or changes?
2. What will be the role of the Civilian Agency Acquisition Council in approving revisions/changes, waivers, and exemptions?
3. Will the Policy Group comment on actions of the Cost Principles Subcommittee when the latter deals with CAS issues?
4. Will the Cost Principles Subcommittee have a formal or informal role/voice in Policy Group actions and vice versa?
5. What are the procedures for the two-step process for public comments? Who will be given the opportunity to comment during the first step of the process?

Your response to the questions above will aid us in understanding the intended function of the CAS Policy Group.

We appreciate your consideration of the questions, comments and views expressed above, and urge that they be taken into account in the establishment and function of the CAS Policy Group. The Section has previously expressed its position concerning the establishment of the CAS Policy Group in its letter of March 23, 1984 (copy attached). However, we believe it would be in the best interest of DoD to work for and support the establishment of an independent agency with authority in this area, a body which would include DoD representation and participation. Our Committee is continuing to work on a proposal of this type and will submit any draft proposals to you for comment.

Very truly yours,

Ruth C. Burg

Ruth C. Burg
Chairperson

Attachment

cc:

Terry L. Albertson, Esq.
Sy Farman, Esq.
James J. Myers, Esq.
Paul G. Dembling, Esq.
C. Stanley Dees, Esq.
Ms. Marilyn Neforas

United States General Accounting Office

GAO

Report to the Director, Office of Management and Budget

November 1987

PROCUREMENT

Assessment of the Office of Federal Procurement Policy

GAO/NSIAD-88-35

GAO

United States
General Accounting Office
Washington, D.C. 20548

National Security and
International Affairs Division

B-206262

November 20, 1987

The Honorable James C. Miller, III
Director, Office of Management
and Budget

Dear Mr. Miller:

As part of our continuing effort to review operations of federal central management agencies, we assessed the Office of Federal Procurement Policy (OFPP). This report discusses the continuing need for OFPP and assesses its performance. It presents the perceptions of the procurement community on how effective OFPP has been in providing leadership for setting government-wide procurement policy as initially envisioned by the Commission on Government Procurement.

This report contains recommendations to you in chapter 4. As you know, 31 U.S.C. 720 requires the head of a federal agency to submit a written statement on actions taken on our recommendations to the House Committee on Government Operations and the Senate Committee on Governmental Affairs not later than 60 days after the date of the report and to the House and Senate Committees on Appropriations with the agency's first request for appropriations made more than 60 days after the date of the report.

We are sending copies of this report to appropriate congressional committees as well as other interested parties.

Sincerely yours,

Frank C Conahan

Frank C. Conahan
Assistant Comptroller General

Executive Summary

Purpose

In 1974, the Congress responded to increasing criticism about the complexity and poor management of federal procurement by creating the Office of Federal Procurement Policy (OFPP). OFPP was to provide executive branch procurement policy leadership, and to coordinate federal procurement policies and practices. OFPP was initially authorized for 5 years and was subsequently reauthorized in 1979 and 1983. OFPP's most recent authorization expired on September 30, 1987. OFPP is currently operating under the continuing resolution.

GAO initiated a general management review of OFPP as part of its continuing effort to assess operations at selected central management agencies.

Background

OFPP, located within the Office of Management and Budget (OMB), was created to simplify and bring consistency to federal procurement. Under its current authorizing legislation, OFPP was given two basic authorities: to provide overall procurement policy direction and leadership in developing executive branch procurement systems and to prescribe government-wide procurement policy. The authority is further defined in legislation in terms of specific OFPP functions. The authority to prescribe government-wide procurement regulations is shared among the General Services Administration (GSA), the National Aeronautics and Space Administration (NASA), and the Department of Defense (DOD). OFPP's authority to issue regulations is limited to situations where GSA, NASA, and DOD are unable to agree on or fail to issue government-wide regulations on time.

To gather a broad range of views from the procurement community about OFPP's past performance and future role, GAO obtained information from a questionnaire completed by procurement executives at 24 government agencies which collectively purchased over 95 percent of the government's goods and services in fiscal year 1985, and by 52 members of 8 private industry associations who had extensive experience in government procurement. GAO also interviewed key OFPP and OMB officials, former OFPP Administrators, and other procurement experts from the military services. In addition, GAO collected and analyzed correspondence and documents from OFPP.

Results in Brief

GAO found that the procurement community believes that a central policy office is needed and that OFPP is the organization to perform this function. However, since its inception in 1974, OFPP has not consistently attained and maintained the leadership role in setting the federal procurement policy initially envisioned. OFPP is perceived as more effective under an appointed administrator and, conversely less effective during lengthy periods under acting administrators. Prior to the appointment of the current administrator, the post was vacant for almost 2 years. Since the appointment of the current administrator, there are indications that OFPP has begun to exercise its authority more assertively.

Principal Findings

Need for a Central Procurement Policy Office

Both government and private sector officials believe that a central procurement policy-making office is needed to oversee government procurement. They support the reauthorization of OFPP, and believe that OFPP can improve the effectiveness of the government's procurement system. Respondents believe that OFPP can address such matters as the procurement community's views on major issues, ensuring uniformity within the Federal Acquisition Regulation (FAR) and its supplements, coordinating the executive branch position on new legislation, and working to professionalize the procurement work force. While a majority of the procurement executives and industry representatives believe that OFPP should be located in OMB, a substantial minority believe that OFPP should be independent.

OFPP's Performance Has Been Uneven

OFPP's performance during the most recent reauthorization period, despite notable achievements such as implementing the FAR, was considered by many members of the procurement community as no more than marginally effective. The procurement community believed that OFPP has not effectively performed several of its basic statutory functions, such as providing overall procurement policy direction and leadership, maintaining the FAR and reviewing FAR supplements, soliciting viewpoints from interested parties on procurement matters, and professionalizing the procurement work force. Furthermore, many also believe that OFPP has not actively sought feedback from users of the procurement system, or initiated action to address problems. The experts identified factors that they perceived as contributing to this uneven performance: a lack of strong management and leadership at OFPP, inadequate support from OMB, and a lack of staff resources. Some also believed that lengthy periods without an appointed administrator hindered OFPP's effectiveness. Few procurement experts believe that OFPP can improve the government's procurement system unless these factors are addressed.

OFPP has begun to exercise its authority more assertively in conducting a needed review of all agency procurement regulations and issuing several letters directing that specific procurement regulations be withdrawn or conformed to existing policy.

Recommendations

GAO recommends that the Director of OMB provide the support needed to assure that OFPP will be able to effectively perform its functions such as those concerning

- overall procurement policy direction,
- coordination in developing executive branch positions on procurement related legislation, and
- leadership in dealing with procurement work force issues.

GAO also recommends that the Director of OMB insure that the position of OFPP Administrator does not remain vacant for long periods. The timely appointment and confirmation of an Administrator is important to demonstrate commitment to OFPP's mission.

Agency Comments

Overall, OFPP stated that GAO's report provided a useful assessment of OFPP's performance since the reauthorization of the office in 1983.

Contents

Executive Summary 2

Chapter 1 Introduction 8
- Procurement Remains Complex 9
- Recent OFPP Initiatives 9
- OFPP Authorities and Functions 10
- Providing Procurement Policy Direction 11
- OFPP Staffing and Funding 13
- Objectives, Scope, and Methodology 14

Chapter 2 Need Still Exists for a Central Procurement Policy-Making Office 16
- Agency Needed to Oversee Procurement 16
- Major Reasons Cited for Central Policy Office 17
- Location for OFPP 19

Chapter 3 OFPP's Performance Seen as Uneven, but With Progress Being Made 20
- Major Functions Not Seen as Effectively Fulfilled 20
- More Active Policy Oversight Needed 27
- Factors Limiting OFPP's Effectiveness 28
- Steps Taken to Increase Effectiveness 31

Chapter 4 Conclusions and Recommendations 33
- Conclusions 33
- Recommendations 34
- Agency Comments 34

Appendixes
- Appendix I: OFPP's Functions and Authorities 36
- Appendix II: OFPP's Expenditures and Authorized Staffing Levels 38
- Appendix III: Our Consultant Panel for OFPP Review 39
- Appendix IV: OFPP Administrators and Their Terms of Office 40
- Appendix V: Comments From the OFPP Administrator 41

Tables

Table 3.1: Summary of OFPP's Use of Policy-Making Mechanisms 21
Table 3.2: Comparison of OFPP's Perceived Overall Effectiveness in Providing Procurement Policy Direction and Leadership 22

Abbreviations

DOD	Department of Defense
FAR	Federal Acquisition Regulation
GSA	General Services Administration
NASA	National Aeronautics and Space Administration
OFPP	Office of Federal Procurement Policy
OMB	Office of Management and Budget

Chapter 1

Introduction

In 1967 and again in 1969, the Congress held extensive hearings concerning the status of federal procurement. The Congress concluded that the federal procurement process was overly complex and the use of patchwork solutions was not the answer to resolving procurement problems. Further, the Congress realized that the procurement process was economically and politically important and of great concern to both the public and private sectors. Therefore, in 1969 the Congress established the Commission on Government Procurement to study the federal procurement system and to recommend ways to promote greater economy, efficiency, and effectiveness within the system.

In its 1972 report, the Commission attributed many problems to "a void in policy leadership and responsibility, and a fragmented and outmoded statutory base." To fill the leadership void, the first of the Commission's 149 recommendations was that a central procurement policy office be established to "take the leadership in procurement policy and related matters." The Commission further recommended that this office consist of a small, highly competent cadre of seasoned procurement professionals preferably located within the Office of Management and Budget (OMB).

After the Commission issued its report, the Congress established the Office of Federal Procurement Policy (OFPP) in 1974. Consistent with the Commission's recommendations, OFPP was authorized to provide executive branch leadership and coordination over all federal procurement policies, kept small, and placed within OMB. Placement within OMB represented an attempt to give OFPP sufficient clout to deal with broad procurement policy. By statute, OFPP was authorized for 5 years. Subsequently, in 1979[1] and again in 1983,[2] the agency was reauthorized with some modifications. OFPP's most recent authorization expired on September 30, 1987. OMB has submitted a proposal for extending OFPP's authorization for 4 more years and the Congress has not yet passed a final bill. OFPP is currently operating under the continuing resolution.

---

[1] Public Law 96-83, Office of Federal Procurement Policy Act Amendments of 1979.

[2] Public Law 98-191, The Office of Federal Procurement Policy Act Amendments of 1983.

Procurement Remains Complex

Federal procurement has more than tripled over the last 15 years, from about $58 billion in fiscal year 1972 when the Commission issued its report, to roughly $190 billion in fiscal year 1987. The procurement process itself can be viewed as complex interactions among three major segments—industry, executive agencies, and the Congress—each serving different roles. The Congress provides funds for the procurement of goods and services, as well as a basic statutory framework and needed oversight. The agencies define needs and procure goods and services from industry according to rules established consistent with legislation, and industry provides the needed goods and services.

These interactions take place within an environment containing thousands of statutory and regulatory provisions and occur at all levels and among numerous subunits within each entity. More specifically, the Congress has numerous committees and subcommittees within both houses that interact with various divisions, branches, and groups within most executive branch agencies on procurement related legislation. Furthermore, each executive agency establishes its own procurement priorities based on its specific mission, and interacts with the Congress and industry to satisfy its needs. Finally, the industrial sector is composed of thousands of companies and corporations involved in manufacturing everything from sophisticated aircraft to paper clips, as well as providing various services. These manufacturing and service entities support numerous trade associations which also interact with both the Congress and the executive agencies.

The Congress created OFPP to provide leadership and procurement policy direction within this complex environment. Past administrators told us that in order to be effective in this environment, OFPP must have the support of OMB's top management. OFPP's broad responsibilities and relatively small staff compels it to rely on the executive agencies for support in implementing needed policy changes. According to past administrators, OMB's backing is occasionally required to insure agency cooperation with OFPP.

Recent OFPP Initiatives

Since 1979, OFPP has undertaken several major efforts to improve the procurement system. In its 1979 authorizing legislation, OFPP was directed by the Congress to develop a comprehensive approach to procurement system reform. OFPP, with extensive cooperation and support from the executive agencies, responded by issuing its Proposal for a Uniform Federal Procurement System in February 1982. This document included proposals for streamlining the procurement system, establishing procurement system standards, enhancing professionalism within the procurement system, and creating a procurement executive within each agency with overall responsibility for agency procurement. In addition, the proposal envisioned a single system of federal acquisition regulations which would be developed and maintained by the agencies and OFPP.

Shortly after issuing the proposal for a uniform federal procurement system, OFPP began to implement many recommendations. For example, OFPP was largely responsible for drafting Executive Order 12352, issued in March 1982, which implemented those recommendations not requiring legislative change. One such change was the creation of procurement executive positions within executive agencies, centralizing responsibility and authority for all agency procurement. Some of the recommendations requiring legislative changes were later included in the Competition in Contracting Act.

The Federal Acquisition Regulation (FAR) was issued on April 1, 1984, under the respective regulatory authorities of the General Services Administration (GSA), Department of Defense (DOD), and National Aeronautics and Space Administration (NASA). The FAR was developed under OFPP leadership and is an attempt to consolidate common existing federal procurement regulations into a single simplified government-wide procurement regulation. Two councils consisting of representatives from executive agencies—the Defense Acquisition Regulation Council and the Civilian Agency Acquisition Council—maintain the FAR and make regulatory changes where necessary. OFPP can only prescribe FAR regulations and procedures if the two FAR councils are unable to agree on, or fail to issue, regulations in a timely manner. Initially, it was proposed that OFPP chair a single FAR maintenance council, but this proposal was rejected, reportedly due to strong objections from DOD, and the two council process was instituted instead.

OFPP Authorities and Functions

Under the 1983 statute, OFPP was given two basic authorities. They are to

- provide overall procurement policy direction and leadership in developing executive branch procurement systems and
- prescribe government-wide procurement regulations and procedures if members of the two FAR councils are unable to agree on, or fail to issue, regulations and procedures in a timely manner.

These authorities are further defined in terms of specific authorized functions. (See app. I for a complete list of OFPP's authorities and functions.) Included among OFPP's specified functions are

- providing leadership and ensuring action by the executive agencies in the establishment, development and maintenance of the single system of simplified government-wide procurement regulations, and resolving differences among agencies that arise relative to these regulations;
- soliciting viewpoints of interested parties in developing procurement policies, regulations, procedures, and forms;
- providing leadership in formulating the executive branch position on procurement legislation; and
- providing for a Federal Procurement Data System to maintain data about federal procurement, and a Federal Acquisition Institute to foster and promote professionalism within the federal acquisition work force.

Recent legislation has proposed that OFPP be assigned two additional functions: (1) promulgating, amending, and interpreting cost accounting standards applicable under federal contracts and (2) developing information related to the profitability of companies providing goods and services to the federal government under negotiated contracts based on cost and pricing data. We have testified in support of both pieces of legislation and believe that OFPP could assume both functions with a minimum of additional staff. We have also issued a report[3] which supports an OFPP role in monitoring contractor profits.

Providing Procurement Policy Direction

In carrying out its responsibilities, OFPP has often relied on its policy-making authority. According to OFPP officials, the process OFPP uses to carry out this authority has four major components:

- data gathering and analysis,
- policy formulation,
- policy implementation, and
- policy oversight.

In practice, this process would be continuous. For example, the oversight component could provide information for the data gathering component.

---

[3] Government Contracting: A Proposal for a Program to Study the Profitability of Government Contractors (NSIAD-87-175, September 1987).

Data Gathering and Analysis

OFPP gathers and analyzes procurement data in numerous ways. For example, the OFPP Administrator chairs the Executive Committee on Federal Procurement Reform. The council is composed of government procurement executives and can provide OFPP with information on current government-wide procurement problems, as well as feedback on how well recent initiatives are working. Also, representatives from the private sector can express their concerns on proposed policies to OFPP through correspondence or by regularly scheduled or informal meetings. Where appropriate, OFPP also holds public meetings to obtain views and suggestions. Furthermore, OFPP performs its own studies of specific problems and has access to a variety of procurement studies completed by agencies or outside consultants.

By analyzing data obtained from these and other sources, OFPP's professional staff, at times supplemented with procurement analysts from other agencies, can determine whether or not a procurement policy change is needed.

Policy Formulation

After identifying a needed change, OFPP staff begin to formulate the needed policy change. In doing so, the staff must also determine the best approach for making the change. OFPP can select one of four methods:

- drafting legislation to change an existing law or to formulate a new law,
- drafting executive orders to be signed by the President,
- drafting OMB Circulars to communicate a significant government-wide policy of a continuing nature, or
- writing policy letters—directives of a continuing nature issued by the OFPP Administrator based on the Administrator's authority to give direction or instruction on the procurement of goods and services.

According to OFPP officials, OFPP prefers to address problems through administrative solutions rather than proposing new legislation. Although OFPP has used each of the above methods in the past, the most frequently used administrative approach is the issuance of policy letters. Policy letters often deal with specific concerns and are usually less general than either executive orders or OMB Circulars.

According to OFPP officials, OFPP always obtains comments from the procurement community on draft policy letters. Drafts are discussed on an informal basis with government and private industry procurement experts, whose comments are obtained and analyzed. This effort can result in several iterations of the proposed draft and span months. Once the draft is agreed on, the proposal is published in the Federal Register and all interested parties can submit their comments. The OFPP staff finalizes the policy after analyzing all of the comments received.

Implementing Policy Letters

Even though policy letters do not change existing laws and can only be issued under existing executive branch authority, OFPP must obtain OMB concurrence before publishing draft and final policy letters in the Federal Register. Once issued, however, policy letters must be incorporated into the FAR and followed by executive agencies.

Overseeing Policy Implementation

Since the regulatory process represents the primary vehicle for implementing changes in procurement policy, OFPP focuses much of its oversight efforts on the FAR Councils. The two councils, which develop the implementing language that is published in the FAR, submit quarterly progress reports to OFPP.

OFPP has recently initiated a new and more thorough regulatory review process. This process includes reviewing not only rules issued through the FAR but also those issued by agencies and their subordinate elements as supplements to the FAR. In addition to examining new rules in their draft and final form, OFPP will also examine existing rules where it appears that such rules are overly burdensome, needlessly complicate the procurement process, or are inconsistent with federal procurement policy.

According to OFPP officials, OFPP also receives feedback from the Federal Procurement Council on implementation of procurement regulations by the executive agencies. In addition, OFPP can participate in OMB's reviews of an agency's budget or management initiatives where procurement initiatives may also be discussed. OFPP personnel can use this opportunity to question agency officials on how well their agency is implementing specific procurement regulations.

OFPP Staffing and Funding

In fiscal year 1987, OFPP was authorized 25 staff positions—18 professional and 7 support staff. As of October 1986 and before the appointment of the current administrator, OFPP had 13 employees—8 professionals and 5 support staff. Since the current administrator was appointed in November 1986, and as of June 1987, OFPP has filled 21 of the Office's 25 authorized positions. This is, according to OFPP officials, the maximum number of positions that can be supported with OFPP's current budget. OFPP has requested an increase of 7 professional staff positions, for a total of 32, in OFPP's fiscal year 1988 budget request.

In fiscal year 1986, OFPP expenditures totaled $1.5 million and its fiscal year 1987 appropriations were $1.6 million. For fiscal year 1988, the President has requested a 54-percent funding increase which, if approved, will result in a budget of $2.466 million. (App. II contains additional details on OFPP's authorized staffing levels and actual expenditures since fiscal year 1974.)

Objectives, Scope, and Methodology

We initiated this review as part of our ongoing effort to assess overall operations of federal central management agencies. A panel of individuals with extensive experience in government procurement was formed. (See app. III.) We worked with them in developing our overall approach and also obtained from them additional guidance as the review progressed. To evaluate OFPP's effectiveness and leadership in the past and to gather a broad range of views about its future role, we obtained the views of individuals with extensive procurement expertise in both government and private industry. Particularly important were the views of those who must use the procurement system: procurement executives responsible for overseeing government agency procurement systems and knowledgeable representatives from industry.

Our objectives were to determine

- whether the procurement community perceives a need for a government-wide central policy office for procurement,
- which procurement policy functions the procurement community believes OFPP should have,
- which organizational and management factors the procurement community believes promote or hinder OFPP's achievement of its mission, and
- how effective OFPP has been in carrying out its congressionally mandated functions.

We used a mail questionnaire directed to government and private industry procurement experts and follow-up interviews or group discussions. We also interviewed numerous key OFPP officials and interviewed other procurement experts, including former OFPP Administrators and current and former senior officials from OMB. Furthermore, we interviewed additional procurement experts from government agencies, the military services, the Defense Logistics Agency, and private industry who were recommended to us by our consultant panel. In addition, we collected and analyzed correspondence and documents from OFPP. The audit work was completed between November 1986 and May 1987.

Questionnaire

We developed a structured mail questionnaire to obtain opinions and information from procurement experts about a variety of issues affecting OFPP, such as the need for OFPP, the proper location for OFPP, OFPP's past performance, and the importance of various procurement issues and who should address these issues. We pretested the questionnaire with several members of the procurement community and obtained comments from the OFPP staff before distribution.

Our survey population consisted of: (1) procurement executives at 24 government agencies which, in fiscal year 1985, collectively purchased over 95 percent of the government's goods and services and (2) 52 industry representatives who had extensive experience in government procurement. The response rates for these groups were 100 percent and 92 percent, respectively. The results from the questionnaire items used in this report are based on the number who answered each item. On average, the maximum number who failed to answer an item was one.

To identify industry representatives, we asked eight major private industry associations to identify up to seven association members with extensive experience in government procurement. The associations' overall membership includes 71 of the top 100 contractors in terms of combined sales to DOD and civilian agencies for fiscal year 1985. The associations identified 52 such experts, of whom 48 returned questionnaires and participated in follow-up meetings. Associations varied in the number of representatives participating in our study. However, we did not find that the number of respondents from an association influenced the results.

Follow-Up Meetings

We requested follow-up interviews with all questionnaire respondents so they could fully present their opinions. All but 1 of the 24 procurement executives agreed to participate in a personal interview about their questionnaire responses. We held small group conferences for the industry representatives from six of the eight associations. However, because two associations were unable to arrange group conferences, we interviewed their members individually by telephone.

Our review was performed in accordance with generally accepted government auditing standards.

Need Still Exists for a Central Procurement Policy-Making Office

In general, both government and private sector procurement experts whom we contacted believe that a central procurement policy-making office is needed to oversee the government's procurement system. They support the reauthorization of OFPP, and believe that OFPP can improve the effectiveness of the government's procurement system. They believe that OFPP can accomplish such tasks as considering the procurement community's views on major issues, ensuring uniformity within the FAR and its supplements, coordinating the executive branch position on new legislation, and working to professionalize the procurement work force. While a majority of the procurement executives and industry representatives in our survey believe that OFPP should be located in OMB, a substantial minority believe that OFPP should be independent.

Agency Needed to Oversee Procurement

Both government and industry representatives contacted during our review agreed on the need for a central procurement policy-making office. Of those responding to our questionnaire, 75 percent of the government procurement executives, along with 94 percent of the industry representatives identified a great or very great need for a central office to provide overall policy guidance and leadership for the federal procurement system. These experts, along with other procurement experts contacted during our review, pointed out that despite attempts to simplify and improve the procurement system—such as the implementation of Executive Order 12352 and the issuance of the FAR—the system remains extremely complex. Central leadership, they believe, is needed to address many remaining procurement problems. Government officials and industry representatives overwhelmingly identified OFPP as the agency that could best provide overall direction and leadership for the procurement process. More specifically, 88 percent of the government procurement executives along with 98 percent of the industry representatives, agreed that OFPP, as either part of OMB or as an independent agency, could best provide the necessary direction and leadership.

Both government procurement executives and industry representatives believe that OFPP can, if properly structured and staffed, improve the effectiveness of the government's procurement process. Seventy-eight percent of the government procurement executives, along with 83 percent of the industry representatives, believe that OFPP, if given the necessary authority, support, and resources, can at least moderately improve the procurement process' effectiveness. Thirty-five percent of government executives and 50 percent of the industry representatives expected such an OFPP to bring about great or very great improvement.

Less than 5 percent of each group believe that OFPP, under those circumstances, would bring about little or no improvement.

Major Reasons Cited for Central Policy Office

Although procurement executives and industry officials expressed a variety of reasons for maintaining a central procurement policy office, several major reasons emerged from discussions with both groups. According to the respondents, OFPP should

- consider all procurement community concerns and develop consistent policy on cross-cutting procurement issues,
- monitor and enforce uniformity in procurement policy and regulations,
- coordinate the executive branch position on procurement legislation, and
- ensure that the federal procurement work force has the necessary skills.

Consider All Community Concerns

Of the individuals responding to our questionnaire, 96 percent of the government procurement executives, along with 100 percent of the industry representatives, want OFPP to continue to solicit viewpoints of interested parties regarding procurement issues. Respondents believe that executive agencies, industry, and other procurement related groups or experts should have an opportunity to make their viewpoints known to OFPP. Some procurement executives noted that OFPP, as a central policy office, is in a unique position to receive input about procurement issues from all members of the procurement community. Industry representatives agree that a central policy office can serve as a forum for all interested parties, and emphasize the need to allow the private sector to make its views known on government-wide procurement issues.

Ensure Uniformity of Regulations

Industry representatives and government procurement executives agreed that the maintenance of uniformity within the FAR and the elimination of inconsistencies between the FAR and its agency supplements is a major concern. Most of those surveyed, especially the industry representatives, believed that ensuring consistency in formulating procurement policies and regulations among federal agencies was a major reason for having a central policy-making office. They stated that the government should seek more standardization in procurement policies and regulations to facilitate economy and efficiency in obtaining needed goods and services. They also stated that without a central office, each agency could develop its own procurement methods which may not be the most economical or efficient.

Further, some government procurement executives noted that the private sector should have only one set of procurement rules governing their actions, regardless of the department or agency involved. In addition, officials from both government and industry stated that a central procurement policy office was needed to insure the FAR councils agree on issues and act in a timely manner and to insure the two councils coordinate their activities.

Coordinate Executive Branch Position on Legislation

Both industry representatives and government procurement executives believe that OFPP is needed to coordinate the development of an executive branch position on proposed procurement legislation. This function is currently assigned to OFPP, and 100 percent of the procurement executives and 94 percent of the industry experts believe that OFPP should retain this function. Seventy-five percent of these respondents believe OFPP should formulate an executive branch position for all procurement related legislation. The remainder believe that OFPP should perform this function only when requested, or in other special circumstances.

Some procurement executives suggested that OFPP should work more closely with the Congress to develop needed procurement legislation while eliminating legislation that attempts to micro-manage the procurement process. They pointed out that the 99th Congress considered over 200 pieces of procurement related legislation. OFPP, they believe, could use its procurement expertise to help the Congress focus on only the most necessary legislative issues. In so doing, they believe that OFPP would also provide a very useful service to both the Congress and the executive agencies.

Professionalize the Procurement Work Force

OFPP is responsible for providing for the Federal Acquisition Institute, a research and management facility dedicated to acquisition work force issues, to foster and promote government-wide career management programs for a professional procurement work force. (The relationship between OFPP and the Federal Acquisition Institute is discussed in greater detail on pages 26 and 27.) Both government and industry respondents identified a need for OFPP to foster greater professionalism within the government's procurement work force through the Federal Acquisition Institute. Seventy-five percent of the government procurement executives and 60 percent of the industry representatives believed that OFPP should have a stronger role in the Federal Acquisition Institute's management. In addition, government procurement executives and industry representatives were nearly unanimous in their assertion that professionalization of the federal procurement work force was one of the most important procurement issues facing the government. By overwhelming margins, they agreed that the skills and qualifications of the federal procurement work force was an issue that OFPP should address.

Location for OFPP

The Commission on Government Procurement grappled with the issue of where to locate OFPP. In the final analysis, the Commission recommended locating OFPP within OMB because this would give OFPP sufficient clout in dealing with the executive agencies.

The majority of both government procurement executives and industry experts believe that OMB is the proper location for OFPP. Of those responding, 57 percent and 69 percent of the procurement executives and industry officials, respectively, thought OFPP should remain within OMB. However, sentiment is still strong for having OFPP operate as an independent agency. Forty-three percent of the procurement executives and 29 percent of the industry officials believed that OFPP should be functioning as an independent entity.

In discussing this issue with the procurement executives and industry representatives in greater detail, we found that the primary motivating factor for wanting an independent OFPP was to enhance its clout and its credibility as an honest broker on procurement issues. This is the same reason given by many who believed OFPP should remain in OMB.

Past administrators also supported locating OFPP in OMB. They believe that this gave OFPP additional prestige and clout. However, they also stated that OMB's top management support is necessary if OFPP is to be effective.

Chapter 3

OFPP's Performance Seen as Uneven, but With Progress Being Made

From its creation in 1974 through December 1986, OFPP's performance as the federal government's procurement policy leader has been uneven. Although OFPP did have some noteworthy achievements during the most recent authorization period—implementing the FAR and working on legislation for increasing competition for example—many of the procurement executives, industry officials, and other procurement experts rated OFPP's overall performance during this period as being no more than marginally effective. They observed that OFPP has not effectively performed several of its basic statutory functions, such as providing overall procurement policy direction and leadership, maintaining the FAR and reviewing FAR supplements, soliciting viewpoints from interested parties on procurement matters, and professionalizing the procurement work force. Some also believed that OFPP has not actively sought feedback from users of the procurement system and initiated action to address problems.

Procurement experts identified factors that they perceived as contributing to OFPP's uneven performance: a lack of strong management and leadership at OFPP, inadequate support from OMB, and a lack of staff resources. Few expect OFPP to improve the government's procurement system unless these problems are solved. However, the appointment of a new OFPP Administrator, along with recent OFPP initiatives, is encouraging.

Major Functions Not Seen as Effectively Fulfilled

Our analysis of comments received from procurement experts, along with the questionnaire results, indicates that OFPP has not effectively fulfilled several of its assigned functions. Many believe that OFPP's efforts to provide overall policy direction and leadership during the most recent authorization period have been at best marginally effective. Respondents want OFPP to more actively pursue needed changes within the federal procurement system. A majority of respondents believe that OFPP's actions with respect to maintaining the FAR system have been ineffective, and many suggested a strengthened OFPP role in the FAR maintenance process, including the review of agency FAR supplements. OFPP's efforts to solicit viewpoints on procurement issues and to professionalize the work force were also rated as no more than moderately effective by the majority of those surveyed.

Providing Overall Direction in Procurement Policy

OFPP is authorized to provide overall direction of procurement policy and leadership in the development of executive agency procurement systems. To do this, OFPP has several mechanisms which include proposing new legislation, testifying on proposed legislation, drafting OMB circulars, drafting executive orders, issuing regulations, and issuing policy letters. Table 3.1 summarizes the frequency with which OFPP has used various mechanisms during its three authorization periods since 1974.

Table 3.1: Summary of OFPP's Use of Policy-Making Mechanisms

Mechanism	Number of Times Used Aug. 74-Sept. 79	Oct. 79-Sept. 83	Oct. 83-Dec. 86
Proposing legislation	a	a	9
Testifying on legislation	51	42	12
Drafting OMB circulars	3	6	4
Drafting executive orders	a	1	a
Issuing regulations	0	b	1c
Issuing policy letters	11	16	3

[a] Not available

[b] OFPP's authority to issue regulations was rescinded during this period.

[c] OFPP was given limited authority to issue regulations during this period.

OFPP officials consider policy letters to be one of OFPP's most effective tools for influencing procurement policy. Although the issuance of such letters has dropped noticeably during the most recent authorization period, OFPP officials believe that this does not reflect a lessening of their effectiveness or performance. They believe that the decline in policy letters during the most recent authorization period reflects: (1) the completion of many issue areas proposed by the Commission on Government Procurement, (2) an increase in procurement legislation to address issues which earlier might have been subjects of policy letters, and (3) the creation and issuance of the FAR, which demanded most of OFPP's resources.

Most of the government procurement executives and industry representatives we contacted believe OFPP has been no more than marginally effective at providing overall procurement policy direction and leadership during the most recent authorization period, with 29 percent of procurement executives and 36 percent of industry representatives rating OFPP as "generally ineffective" or "very ineffective." Despite this, respondents rated OFPP's performance more favorably when considering not only the most recent period, but also OFPP's first two authorization periods. Table 3.2 summarizes these perceptions.

Table 3.2: Comparison of OFPP's Perceived Overall Effectiveness in Providing Procurement Policy Direction and Leadership

Figures in percent of respondents

Respondents	Very or generally effective since		Marginally effective since		Generally or very ineffective since	
	1974	1983	1974	1983	1974	1983
Procurement executives[a]	46	25	46	46	4	29
Industry officials[a]	23	13	60	51	15	36

[a] Percentages based upon responses received from 24 government procurement executives and 47 industry procurement representatives. Percentages may not add to 100 because one procurement executive and one industry official did not rate OFPP's effectiveness since 1974.

Many government procurement executives and industry experts believe that OFPP should be more active and more willing to take a leadership role in policy-making. The procurement executives (79 percent) and industry experts (96 percent) believe OFPP should be more active in evaluating polices and their implementation, identifying problems within the procurement environment, and recommending changes to promote a procurement system that best serves those who manage it and those who are served by it.

Maintaining a Current Reform Agenda

In 1982 OFPP issued its Proposal for a Uniform Federal Procurement System which included a procurement management system and an outline of the legislation needed to implement the new system. Those initiatives which could be enacted without legislation were incorporated into Executive Order 12352, Federal Procurement Reforms, which became OFPP's reform agenda. An executive committee was established to assist in planning and overseeing the executive order's implementation. The committee was composed of representatives of eight major procuring agencies along with the Small Business Administration and the Office of Personnel Management and was chaired by the OFPP Administrator.

The executive committee focused its efforts on three areas. Efforts in the first area focused on establishing a model charter for agency procurement executives to follow in overseeing the procurement activities at their respective agencies. This was accomplished in 1982 when OMB issued the Model Charter. The second area involved the promulgation of criteria for enhancing competition and for evaluating agencies' existing procurement systems. In 1984, OMB issued policy guidance dealing with criteria for enhancing competition and evaluating and certifying procurement systems. As of September 1987, 31 department and agency procurement executives had certified their systems as being in compliance with the established guidelines. The third area dealt with establishing guidelines on various facets of procurement career management programs. In October 1985, OFPP issued guidelines on various facets of the procurement career management program. The Federal Acquisition Institute, as executive agent for OFPP, is directing the implementation of these guidelines.

OFPP officials stated that the 1982 agenda remained the OFPP's official management plan until March 1987. We found no evidence that the previous agenda had been revised to reflect what had already been accomplished, and to address new issues within the procurement community. Only in 1987 did OFPP's agenda recognize the changes which occurred as a result of developing the FAR and increasing competition.

In commenting on a draft of this report, OFPP said that while it was true that with the appointment of a new administrator in 1986, OFPP did start to move in new areas, this was not because of any failure on OFPP's part to recognize that the FAR and other initiatives were important. OFPP also noted that Executive Order 12352 was the first and only executive order directed solely at procurement reform and that it called for broad based procurement reforms that could only be implemented over a number of years.

Many survey respondents recommended that OFPP should more actively initiate procurement reforms and not simply react to the initiatives of others. They identified several issues that they believe are important to the procurement community and which OFPP should take a stronger leadership role in addressing. These issues include:

- Competition in government contracting—respondents noted that the Competition in Contracting Act needs monitoring and "fine tuning." They believe that OFPP should develop guidance to insure that the government always uses competition to its best advantage.
- Appropriate use of contract type—several respondents believe that OFPP should provide more guidance on the use of contracts, and should work to insure consistency while exploring innovative contracting techniques.
- Procurement of commercial goods and services—industry representatives in particular believe that OFPP could help create a more balanced approach to DOD's procurement of commercial goods and services not designed to military specifications.
- Roles of the Congress, executive agencies, and industry in the procurement process—some respondents believe that the Congress was passing

too much procurement legislation that attempted to micro-manage the procurement process.

Maintaining the FAR

OFPP is authorized to provide leadership in maintaining the FAR, to resolve differences between the two FAR councils, and to issue needed regulations if they fail to act in a timely manner. Since this system was established, OFPP has attempted to use this authority only once prior to 1987 and that was to change the "Rule of Two." This rule would have changed the criteria used by contracting officers to set aside contracts for small businesses. OFPP did not initiate this regulatory change; rather, OFPP responded to a congressional request to change the regulations. After the FAR councils refused to implement the requested change, OFPP drafted a proposed regulation and requested public comments. The proposal proved to be very controversial and OFPP eventually made no further efforts to implement this change.

Most of the industry representatives, along with a majority of the government procurement executives, believe that OFPP's FAR maintenance performance was no more than moderately effective. Forty-seven percent of the industry representatives and 38 percent of the government procurement executives believe that OFPP's performance has had little or no effect. It should be noted, however, that a substantial number of procurement executives (38 percent) were not sure of or could not judge OFPP's effectiveness in this area.

Eighty-five percent of industry representatives believed that OFPP's role should be strengthened with regard to maintaining the FAR. Many (63 percent) of those supporting a strengthened OFPP role supported the formation of a single FAR council chaired by OFPP, which could continue to prescribe regulations if council members failed to agree. Procurement executives were less supportive of such a change, with only 50 percent agreeing that OFPP's role should be strengthened. Among this group, 83 percent supported the single council concept.

Reviewing FAR Supplements

Under the FAR system, individual agencies are permitted to issue supplementary regulations to meet specific agency needs, although these supplements cannot duplicate the FAR and must be consistent with it. OFPP can review FAR supplements and other agency procurement regulations and recommend to the OMB Director that duplicate, inconsistent, or other inappropriate regulations be rescinded. Through October 1986, OFPP limited its role in reviewing supplements to those which involved interagency procurement policy issues. This approach defined differences in procurement policy among the three DOD services as DOD concerns and outside of OFPP's jurisdiction. This was the approach described by the previous administrator, and it was continued under subsequent acting administrators. Between April 1984 and December 1986, OFPP did not recommend that any supplemental regulations be rescinded, although the DOD Inspector General recently determined that 20 percent of the lines in the DOD FAR supplements were not in accordance with the FAR.[1]

Industry representatives, in particular, were not satisfied with OFPP's performance reviewing agency supplements. Many perceived that agency supplements were inconsistent about some issues; they also emphasized that OFPP, as the central policy office, should investigate the proliferation of supplements. Ninety-two percent of industry representatives believed that OFPP should have a stronger role in insuring that only essential agency supplements remain in the FAR system. In contrast, only 38 percent of the procurement executives believed that OFPP should have an expanded role. The procurement executives who believe that OFPP's role should remain unchanged also believe the existing process gives them much needed flexibility to address specific agency needs.

In its comments on this report, OFPP noted that it has recently reemphasized its regulatory role. It stated that in the 9-month period ending on September 30, 1987, it had reviewed 68 proposed procurement regulations, and provided comments or raised objections to 35. Similarly, OFPP analyzed 46 proposed procurement paperwork cases (submitted to OMB by the agencies for clearance in accordance with the Paperwork Reduction Act) and provided comments or raised objections on 18 of them.

Soliciting Viewpoints of Interested Parties

OFPP is required to establish criteria and procedures to ensure the effective and timely solicitation of the viewpoints of interested parties in the development of procurement policies, regulations, procedures, and forms. To address this requirement, OFPP has issued a policy letter which established uniform criteria and procedures the executive agencies will use to get the views of interested parties. It required that notice of all significant policies and procedures be published in the Federal Register for comments at specific time periods.

---

[1] DOD's Implementation of the Federal Acquisition Regulation, DOD Inspector General Audit Report, January 28, 1987.

Despite this requirement, many procurement experts do not believe that OFPP has effectively insured that views will be solicited by agencies during the development of polices, procedures, and forms. Industry representatives, for example, are not satisfied with the present process of publicizing changes to the government's procurement regulations and receiving public comments. Many believed that by the time a draft regulation is published, significant changes will not be made in response to public comments. Industry representatives do not believe their comments are seriously considered. They believe agencies have already invested much time and effort in the draft regulation, and are therefore, unwilling to make meaningful changes.

Professionalizing the Work Force

As part of the work being done under Executive Order 12352, a task force examined procurement work force issues. It developed guidance on various facets of procurement career management programs within the federal government. OFPP, which is authorized through the Federal Acquisition Institute to foster and promote government-wide career management programs for a professional procurement work force, provided copies of this guidance to federal procurement executives to help them in developing their agency's system.

OFPP's 1983 reauthorizing legislation placed the Federal Acquisition Institute within the GSA, with GSA functioning as the executive agent on behalf of OFPP. Despite OFPP's responsibility to provide the Federal Acquisition Institute with policy guidance, we found little evidence of interaction between the two. Although the Federal Acquisition Institute was transferred to GSA in January 1984, it was not until October 1, 1986, that a Memorandum of Understanding between GSA and OFPP regarding the Federal Acquisition Institute was signed. This memorandum assigns OFPP a "policy oversight role," although OFPP has provided little guidance to the Federal Acquisition Institute on projects or goals since that time. The Institute had 13 staff members on board when it moved to GSA; as of February 1987, it had 6 staff members. The Institute has been assigned additional procurement training responsibilities within GSA which officials told us may limit their ability to carry out overall Institute responsibilities relative to the entire federal work force.

Government procurement executives were not satisfied with OFPP's efforts to professionalize the procurement work force through the Federal Acquisition Institute during the most recent authorization period. None of the respondents believe that OFPP had been more than moderately effective in this area, with 42 percent describing OFPP's performance as being of "little or no effectiveness." Most industry representatives, having little contact with the Institute, were unable to judge OFPP's performance, although during conferences industry experts strongly stated the need for the government to develop a cadre of procurement professionals.

More Active Policy Oversight Needed

We examined OFPP's methods for formulating and implementing required policy before the current administrator's appointment. We found that OFPP's established procedures for gathering data, formulating policy, and implementing policy were in place. However, the policy-making process also depends on obtaining timely feedback and taking necessary action based on this feedback. We found a reluctance on OFPP's part, particularly when operating under an acting administrator, to initiate actions in response to the feedback received from the procurement community.

The previous OFPP Administrator used a management council—the Federal Procurement Council, composed of agency procurement executives—and periodic public meetings with industry officials to disseminate as well as gather information and obtain feedback on how the procurement system was operating. These meetings were held regularly and discussions of issues were substantive and useful, according to the former administrator.

However, during the most recent period when OFPP had no appointed administrator, scheduled Federal Procurement Council meetings were often canceled, representatives of the procurement executives rather than the procurement executives frequently attended, and, according to participants, much of the subject matter dealt with OFPP providing information with very little discussion or feedback to OFPP. Furthermore, OFPP's public meetings with industry officials ceased.

Many government procurement executives expressed concern about OFPP's use of the Federal Procurement Council during this period. Fifty-eight percent of the procurement executives believe that OFPP has been no more than moderately effective at using this feedback mechanism, including 17 percent who believe that OFPP's use of the council has had little or no effectiveness. Conversely, 25 percent believed that OFPP had been very effective in using the council.

Private industry representatives were also concerned about OFPP's lack of an effective mechanism for receiving feedback on the procurement system. For example, we were repeatedly told that within DOD, policies often varied among services and sometimes between different commands within the same service. The Navy's approach toward the funding of research and development was of particular concern. The Navy's policy was viewed as shifting a greater financial burden to the contractors than the policies of other services. However, several industry officials did not feel that OFPP had an adequate formal channel for receiving this type of information and initiating necessary corrective action.

OFPP officials agreed that the councils had become less effective as a feedback mechanism since the departure of the previous administrator in 1985. The acting administrator was instructed to serve as a caretaker until the appointment and confirmation of the next OFPP Administrator, and not to initiate new action. As a result, maintaining policy oversight, obtaining user feedback, and initiating corrective action became lower priorities at OFPP.

Factors Limiting OFPP's Effectiveness

We asked the procurement experts to identify factors which they believed inhibited or limited OFPP's effectiveness in fulfilling its statutory functions. They focused on three major factors: lack of strong OFPP management and leadership, inadequate support from OMB, and a lack of adequate staff resources. Most also believe that these factors must be addressed if OFPP is to be an effective procurement policy leader.

Lack of Strong Management and Leadership

Many experts criticized OFPP for displaying a lack of strong management and leadership. For example, of those responding to our questionnaire and believing that OFPP had been relatively ineffective managing the FAR, 71 percent of government executives and 70 percent of industry respondents indicated that a lack of strong management or leadership contributed to this outcome. Similarly, of those dissatisfied with OFPP's efforts to professionalize the work force, 67 percent of procurement executives and 44 percent of industry representatives saw a lack of strong management or leadership as contributing to OFPP's performance. Lack of leadership or management was also a major factor cited by those who believe OFPP did not effectively solicit viewpoints on procurement issues, and also by those who believe that OFPP does not effectively use the Federal Procurement Council to obtain feedback on the procurement process.

Some also suggested that OFPP's frequent, and sometimes lengthy, periods of time in which it operated without an appointed administrator have contributed to this perceived lack of leadership and management. In total, there have been five administrators with tenures ranging from less than 1 year to 3-1/2 years. (See app. III for a list of tenures of each administrator.) Furthermore, during four extended periods totaling 3-1/2 years, OFPP operations were directed by acting administrators. Acting administrators were perceived as caretakers, simply holding OFPP together until a new administrator was appointed and confirmed. Some experts believed that the long period without an appointed administrator was directly responsible for OFPP's uneven performance during the most recent reauthorization period. They noted that OFPP's major accomplishments—implementation of the FAR and its efforts supporting the Competition in Contracting Act—occurred when OFPP had an appointed administrator. This administrator departed and was not replaced for nearly 2 years, which some members of the procurement community interpreted as an indication of lower priority and prestige for OFPP within OMB.

Inadequate Support From OMB

The Commission on Government Procurement recommended placing OFPP in OMB to insure that the OFPP had sufficient authority. To function effectively in the procurement environment, the Commission believed that OFPP needed strong linkages to top officials at OMB. Ninety-one percent of government procurement executives and 91 percent of industry representatives agreed that sufficient support from OMB is of great or very great importance to the successful achievement of OFPP's mission. Former OFPP Administrators contacted during our review agreed that support from OMB's top management was needed to insure success of OFPP initiatives. In fact, they believed they had been most effective at OFPP when they had such support.

Some survey respondents did not believe that this necessary support is always present. For example, of those who believe that OFPP was not effectively maintaining the FAR, 50 percent of government executives and 63 percent of the industry representatives believe that a lack of OMB support contributed to OFPP's performance. Lack of OMB support was also a factor cited by those who believe OFPP did not effectively solicit viewpoints on procurement issues, and by those who believe that OFPP had not been doing enough to professionalize the procurement work force.

Lack of Adequate Staff Resources

As envisioned by the Commission on Government Procurement, OFPP would be staffed at all levels by knowledgeable senior procurement experts, and that such assignments would be highly desirable. Our survey respondents overwhelmingly agreed that sufficient procurement expertise within OFPP is a factor of great or very great importance to the achievement of OFPP's mission. However, at times, OFPP has not been able to attract and retain needed staff; we were told that this becomes even more difficult when OFPP's authorization is about to expire and people are reluctant to work for an agency which may cease to exist in the near future.

In addition, OFPP is not viewed as having a staff with extensive procurement expertise. Some suggested that a rotational program between OFPP and the executive agencies is needed to insure that OFPP staff remains current and up-to-date.

Some procurement experts believe that OFPP did not effectively complete its statutory tasks due to a lack of staff resources. OFPP has traditionally maintained a small staff and is currently authorized 25 slots. The level of staff on-board declined to 13—8 professional and 5 support staff—by June 1986. Some believe that this decline reflected OMB's lack of concern for OFPP, and that given OFPP's broad responsibilities, little can be expected from such a small staff.

Little Expectation of Improvement

Many government procurement executives and industry representatives believe that the factors which have limited OFPP's effectiveness in the past need to be overcome for OFPP to be an effective leader within the procurement community. Forty-five percent of the procurement executives, along with 45 percent of the industry representatives, believed that, if allowed to continue with the same functions, authorities, resources, and organizational relationships as in January 1987, OFPP would create little or no improvement within the government procurement system. Less than 5 percent of each group expected great or very great improvement under these circumstances.

Steps Taken to Increase Effectiveness

Recently, steps have been taken to increase OFPP's effectiveness. The appointment and confirmation of a new OFPP Administrator has brought some stability to OFPP's leadership. Renewed support from the Director and Deputy Director at OMB is also evident and OFPP has filled several vacancies. At the time we talked with procurement experts from government and industry, little was known about how these changes would affect OFPP's performance. However, OFPP's recent actions have begun to address several of the concerns raised by these experts during our discussions.

For example, OFPP has begun to enforce government-wide regulatory consistency through review of all proposed and final federal procurement regulations. On June 5, 1987, OFPP instructed DOD to rescind its rules on retaining amounts, without cause, from progress payments under federal construction contracts. According to OFPP, several defense contractors complained that DOD's policy was in conflict with both the FAR and an earlier OFPP policy letter. In response, OFPP issued instructions for DOD to rescind this policy and DOD has agreed to do so. In another case, OFPP expressed its concern to the Defense Acquisition Regulatory Council over proposed changes to the FAR involving the amount of funds that can be withheld to protect the government's interests from amounts due to contractors under cost and cost-plus-fee type contracts. OFPP wanted additional information which included why existing procedures were no longer adequate, what effect such inadequate protection had in the past, and what other alternatives were available to protect the government's interest. In response, the council began developing alternatives which would provide the federal government with greater flexibility in applying withholding fees. OFPP also intends to use its statutory authority to recommend rescission of supplements not consistent with the FAR. For the period from February 1987 through October 1987, OFPP has completed action on 73 regulatory reviews. In 70 of these reviews OFPP has recommended that the regulation be approved and in the remaining 3 reviews has recommended that the regulation be disapproved. Of the 70 reviews in which approval was recommended, OFPP provided additional comments on 33.

In commenting on this report, OFPP noted that in addition to enforcing government-wide regulatory consistency, it has developed a comprehensive agenda which includes initiatives to:

- restore the authority of contracting officers;
- draft a consolidated, simplified procurement statute applicable government-wide;

- simplify contracting procedures while favoring the purchase of commercially available items;
- streamline the regulatory development process; and
- improve procurement data collection, streamline the procurement process through more use of automation, and make better use of its testing authorities.

Chapter 4

Conclusions and Recommendations

Conclusions

We believe the need for a centralized government-wide procurement policy-making office still exists. Both government and private sector procurement experts believe that a central procurement policy-making office is needed to oversee the government's procurement system, and they support OFPP's reauthorization. This support of OFPP by government procurement executives is particularly important, since OFPP needs agency input and assistance to be effective.

Past actions, such as the creation of the FAR system, are indicative of OFPP's potential to bring about positive change. The procurement community looks to OFPP for similar leadership in carrying out its current functions: considering the procurement community's views on major issues, ensuring uniformity within the FAR and its supplements, coordinating the executive branch position on new legislation, and working to professionalize the procurement work force.

However, from its creation in 1974 through December 1986, OFPP has not always successfully accomplished its basic statutory functions. The results of our work have shown that OFPP has missed opportunities for critical involvement in procurement issues since its establishment. Our survey of procurement experts indicated that this was particularly true during its most recent authorization period. Rather than actively identifying problems and initiating corrective actions, OFPP appeared (1) willing to react to the initiatives of others and (2) reluctant to initiate action based upon feedback provided by the procurement community. We believe that active involvement of OFPP with assertive leadership and linkages to the Director of OMB and the procurement community can only enhance federal government procurement operations.

Factors identified as contributing to OFPP's perceived ineffectiveness include a lack of strong management and leadership at OFPP, inadequate support from OMB, and a lack of adequate OFPP staff resources. Each of these is reflected in the fact that during much of this period, OFPP operated without an appointed administrator.

Recent events, however, are reason for optimism. A new OFPP Administrator has been appointed and confirmed, ending a period of almost 2 years without an appointed administrator. OFPP has also filled several vacancies. This may address OFPP's staff res[illegible] needs, and many believed that it indicates increased OMB support for OFPP. OFPP has also begun to use its existing authority more assertively, demonstrating the type of leadership that the Commission on Government Procurement envisioned for this small office of procurement professionals, and that it deemed so essential to OFPP's success. While these steps indicate that OFPP is taking the needed action for establishing its leadership role, continuation of such efforts will be critical to its success as a central focal point for policy formulation.

Recommendations

We recommend that the Director of OMB provide the support needed to assure that OFPP will be able to effectively perform its functions such as those concerning

- overall procurement policy direction,
- coordination in developing executive branch positions on procurement related legislation, and
- leadership in dealing with procurement work force issues.

Because effective and dynamic leadership is such a critical ingredient to the success of such a small central office, we also recommend that the Director of OMB insure that the position of OFPP Administrator does not remain vacant for long periods. The timely appointment and confirmation of an administrator is important to demonstrate commitment to OFPP's mission.

Agency Comments

In its comments on a draft of this report, OFPP said that in general it provided a useful assessment of OFPP's performance since reauthorization of the Office in 1983. OFPP made several specific suggestions and we incorporated most of them in the final report. OFPP also expressed the view that in some parts of the draft report the questionnaire results were presented as facts rather than opinions. We have attempted to assure that the source of all data used in the report is accurately presented.

OFPP noted several instances where it felt only negative perceptions were reported without providing insight as to how to solve the problems that exist. Our primary objective in conducting this review was to determine whether the procurement community believed that a central procurement policy-making office was still needed and, if so, what office should fill that role. In exploring this issue with respondents to our questionnaire, they commented on areas where they believed OFPP was falling short of fulfilling some of its functions. We did not attempt to develop solutions to all of the problems, however, we did attempt to report their perceptions with the expectation that such information would be useful to OFPP in developing its future agenda.

Appendix I

OFPP's Functions and Authorities

Public Law 98-191 delineates the authority and functions of the OFPP Administrator. Excerpts from this act are included below.

The Administrator shall provide overall direction of procurement policy and leadership in the development of procurement systems of the executive agencies. To the extent that the Administrator considers appropriate, in carrying out the policies and functions set forth in this act, and with due regard for applicable laws and the program activities of the executive agencies, the Administrator may prescribe government-wide procurement policies which shall be implemented in the single system of government-wide procurement regulations and shall be followed by executive agencies in the procurement of—

(1) property other than real property in being;
(2) services, including research and development; and
(3) construction, alteration, repair, or maintenance of real property.

In any instance in which the Administrator determines that DOD, NASA, and GSA are unable to agree on or fail to issue government-wide regulations, procedures, and forms in a timely manner, the Administrator may, with due regard for applicable laws and the program activities of the executive agencies, prescribe government-wide regulations, procedures, and forms which shall be followed by the executive agencies in the procurement of—

(1) property other than real property in being;
(2) services, including research and development; and
(3) construction, alteration, repair, or maintenance of real property.

The functions of the Administrator shall include—

(1) providing leadership and ensuring action by the executive agencies in the establishment, development, and maintenance of the single system of simplified government-wide procurement regulations and resolving differences among the executive agencies in the development of simplified government-wide procurement regulations, procedures and forms;

(2) coordinating the development of government-wide procurement system standards that shall be implemented by the executive agencies in their procurement systems,

(3) providing leadership and coordination in the formulation of the executive branch position on legislation relating to procurement;

(4) providing for a computer-based Federal Procurement Data System which shall be located in the GSA (acting as executive agent for the Administrator) and shall collect, develop, and disseminate procurement data;

(5) providing for a Federal Acquisition Institute which shall be located in the GSA (acting as executive agent for the Administrator) and shall

(a) foster and promote government-wide career management programs for a professional procurement work force and

(b) promote and coordinate government-wide research and studies to improve the procurement process and the laws, policies, methods, regulations, procedures, and forms relating to procurement by the executive agencies;

(6) establishing criteria and procedures to ensure the effective and timely solicitation of the viewpoints of interested parties in the development of procurement policies, regulations, procedures, and forms;

(7) developing standard contract forms and contract language in order to reduce the government's cost of procuring property and services and the private sector's cost of doing business with the government;

(8) completing actions, as appropriate, on the recommendations of the Commission on Government Procurement.

OFPP's Expenditures and Authorized Staffing Levels

Expenditures in millions

Fiscal years	Expenditures	Authorized staff level
1975	$0.2	4
1976	0.9	20
1977	1.5	27
1978	1.6	28
1979	2.7	45
1980	2.9	45
1981	2.6	42
1982	2.4	41
1983	2.3	41
1984	2.6	41
1985	1.6	25
1986	1.5	25
1987	1.7	25

Note: Federal Acquisition Institute staff and budget was included in OFPP totals for FY 79 - FY 84

Appendix III

Our Consultant Panel for OFPP Review

Mr. Ray Kline	President of the National Academy of Public Administration and former GSA Deputy Administrator
Gen. Robert T. Marsh	Former Commander of the Air Force Systems Command
Mr. Robert C. Moot	Former Assistant Secretary of Defense (Comptroller) and former Administrator of the Small Business Administration
Mr. Thomas D. Morris	Former Assistant Comptroller General and former Assistant Secretary of Defense (Installations and Logistics)
Mr. Barry J. Shillito	Former Chief Executive Officer of Teledyne Corporation and former Assistant Secretary of Defense (Installations and Logistics)
Mr. Donald E. Sowle	Former OFPP Administrator and former Staff Director for the Commission on Government Procurement

Appendix IV

OFPP Administrators and Their Terms of Office

Hugh E. Witt, December 1974 - January 1977
Vacant: February 1977 - March 1977

Lester A. Fettig, April 1977 - April 1979
Vacant: May 1979 - February 1980

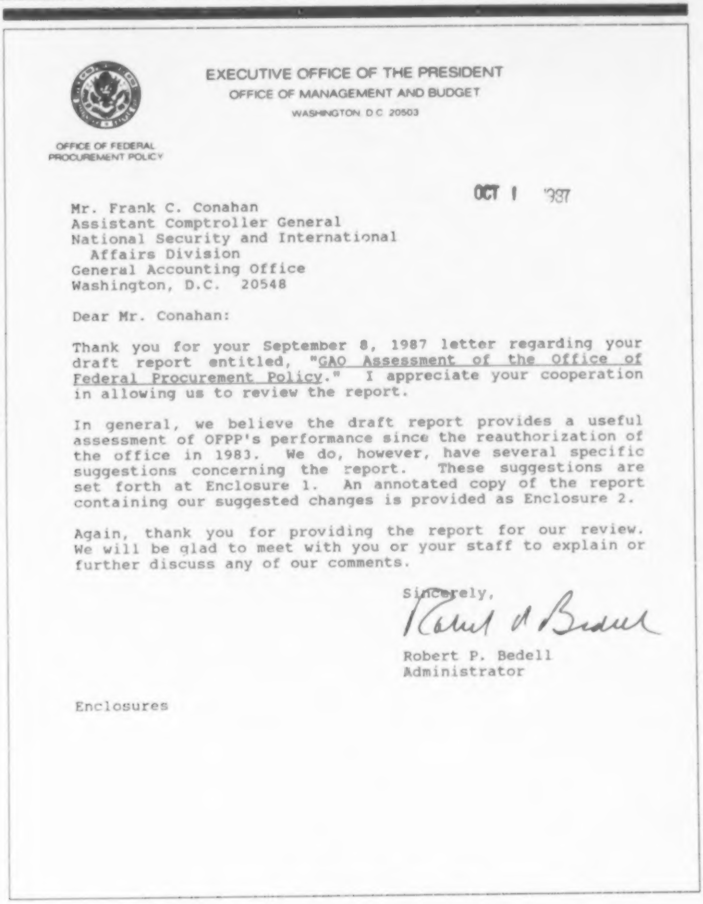
Karen Hastie Williams, March 1980 - February 1981
Vacant: March 1981 - June 1981

Donald E. Sowle, June 1981 - January 1985
Vacant: January 1985 - November 1986

Robert P. Bedell, November 1986 - present

Appendix V

Comments From the OFPP Administrator



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

OFFICE OF FEDERAL
PROCUREMENT POLICY

OCT 1 1987

Mr. Frank C. Conahan
Assistant Comptroller General
National Security and International
Affairs Division
General Accounting Office
Washington, D.C. 20548

Dear Mr. Conahan:

Thank you for your September 8, 1987 letter regarding your draft report entitled, "GAO Assessment of the Office of Federal Procurement Policy." I appreciate your cooperation in allowing us to review the report.

In general, we believe the draft report provides a useful assessment of OFPP's performance since the reauthorization of the office in 1983. We do, however, have several specific suggestions concerning the report. These suggestions are set forth at Enclosure 1. An annotated copy of the report containing our suggested changes is provided as Enclosure 2.

Again, thank you for providing the report for our review. We will be glad to meet with you or your staff to explain or further discuss any of our comments.

Sincerely,

Robert P. Bedell
Administrator

Enclosures

Enclosure 1

OFPP Comments on Draft GAO Report
Entitled "GAO Assessment of the Office Of
Federal Procurement Policy"

Executive Summary:

Now on p. 2.

1. Page 1, Background, first paragraph.

   The words "regulations and procedures" should be removed from the eighth line and replaced with "procurement policy." This change will conform the report more closely to the basic authorities prescribed in the OFPP Act (41 U.S.C. 405). Similarly, the last sentence of the paragraph should be rewritten as follows: "The authority to prescribe Government-wide procurement regulations is shared among the General Services Administration, the National Aeronautics and Space Administration and the Department of Defense." A concluding sentence should then be added as follows: "OFPP's authority to issue regulations is limited to situations where GSA, NASA and DOD are unable to agree on or fail to issue Government-wide regulations in a timely manner." This, again, brings the report into agreement with the OFPP Act and eliminates the impression that GSA, NASA and DOD constitute the FAR Councils. Over 10 agencies are represented on the Civil Agency Acquisition Council, but only three, GSA, NASA and DOD, have Government-wide regulatory authority.

2. Page 1, Background, second paragraph.

   The words "consultant panel," third line from the bottom of the page should be deleted or explained.

Now on p. 2.

3. Page 2, Results in Brief, first paragraph.

   We suggest that the word "consistently" be added to the next to the last sentence as follows: "... OFPP has not "consistently" attained and maintained...." The sentence as presently written is an unequivocal statement that OFPP has never been effective.

Now on p. 2.

4. Page 2, OFPP's Performance Has Been Uneven, last paragraph.

   We suggest that the first sentence be deleted. The sentence as now written, does not agree with the title of the paragraph. The sentence indicates that OFPP performance has been even, i.e., marginally effective. The remainder of the paragraph should be rewritten as indicated on the enclosed copy. Where statements are made in the report on the basis of views or opinions, we suggest that they be presented as such and not as statements of fact unless substantiating empirical data are presented.

Now on p. 4.

5. Page 3, OFPP Using Authority more Assertively, second sentence.

The second sentence should be expanded as follows: "This is most evident in OFPP's more active review of all agency procurement regulations and in their issuance of several recent letters directing that specific procurement regulations be withdrawn or conformed to existing policy."

Chapter 1.

Now on p. 10.

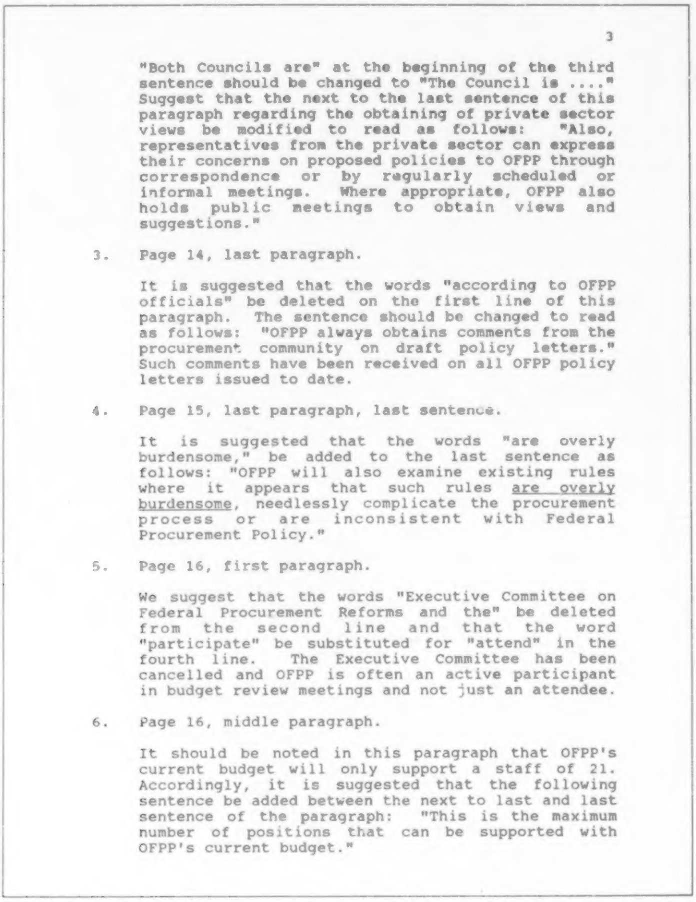
1. Page 10, middle paragraph.

We suggest that the first two lines of the middle paragraph be changed to read: "The Federal Acquisition Regulation (FAR) was issued on April 1, 1984, under the respective regulatory authorities of the General Services Administration, Department of Defense, and National Aeronautics and Space Administration. The FAR was developed under OFPP leadership and is an attempt to consolidate common existing procurement...." As presently written, the two lines are erroneous. OMB did not issue the FAR, and the FAR effort was designed to consolidate common existing procurement regulations and not all procurement regulations. The first line of the last sentence of this paragraph should state, "An initial FAR maintenance proposal provided for OFPP to chair a single FAR maintenance...." As the sentence now reads, it appears that agreement had been reached on OFPP chairing a single council.

Now on p. 12.

2. Page 13, first paragraph.

The introductory clause, "According to OFPP officials," is not necessary and should be deleted. In the second sentence, reference to the "Executive Committee on Federal Procurement Reforms" should be deleted as this Committee has been cancelled. The second sentence would now read: "For example, OFPP chairs the Federal Procurement Council." The words



3

"Both Councils are" at the beginning of the third sentence should be changed to "The Council is ...." Suggest that the next to the last sentence of this paragraph regarding the obtaining of private sector views be modified to read as follows: "Also, representatives from the private sector can express their concerns on proposed policies to OFPP through correspondence or by regularly scheduled or informal meetings. Where appropriate, OFPP also holds public meetings to obtain views and suggestions."

Now on p. 12.
See comment 1.

3. Page 14, last paragraph.

It is suggested that the words "according to OFPP officials" be deleted on the first line of this paragraph. The sentence should be changed to read as follows: "OFPP always obtains comments from the procurement community on draft policy letters." Such comments have been received on all OFPP policy letters issued to date.

Now on p. 13.

4. Page 15, last paragraph, last sentence.

It is suggested that the words "are overly burdensome," be added to the last sentence as follows: "OFPP will also examine existing rules where it appears that such rules are overly burdensome, needlessly complicate the procurement process or are inconsistent with Federal Procurement Policy."

Now on p. 13.

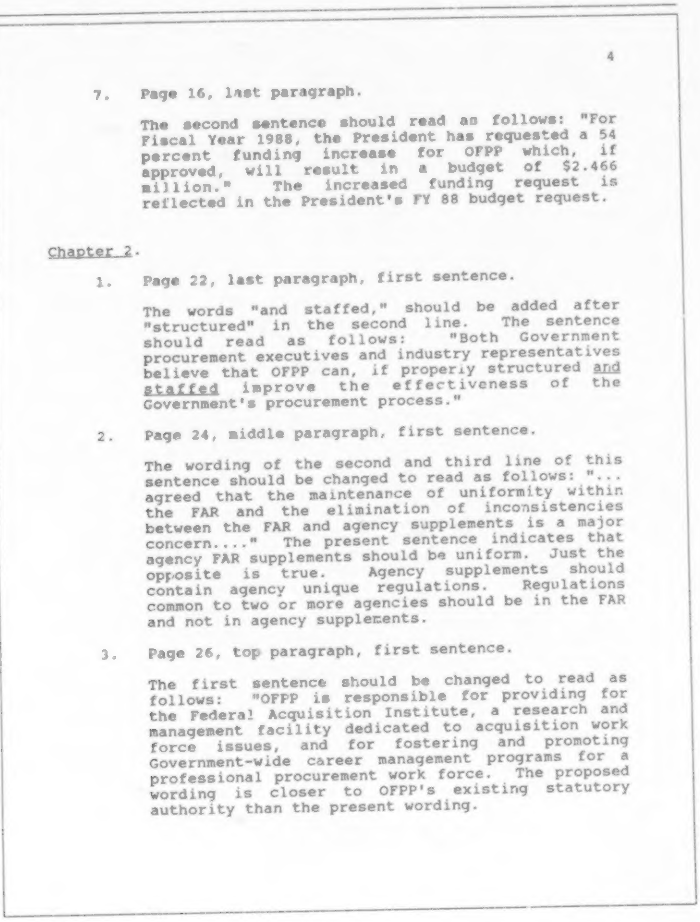
5. Page 16, first paragraph.

We suggest that the words "Executive Committee on Federal Procurement Reforms and the" be deleted from the second line and that the word "participate" be substituted for "attend" in the fourth line. The Executive Committee has been cancelled and OFPP is often an active participant in budget review meetings and not just an attendee.

Now on p. 13.

6. Page 16, middle paragraph.

It should be noted in this paragraph that OFPP's current budget will only support a staff of 21. Accordingly, it is suggested that the following sentence be added between the next to last and last sentence of the paragraph: "This is the maximum number of positions that can be supported with OFPP's current budget."



Now on p. 14.

7. Page 16, last paragraph.

The second sentence should read as follows: "For Fiscal Year 1988, the President has requested a 54 percent funding increase for OFPP which, if approved, will result in a budget of $2.466 million." The increased funding request is reflected in the President's FY 88 budget request.

Chapter 2.

Now on p. 16.

1. Page 22, last paragraph, first sentence.

The words "and staffed," should be added after "structured" in the second line. The sentence should read as follows: "Both Government procurement executives and industry representatives believe that OFPP can, if properly structured and staffed improve the effectiveness of the Government's procurement process."

Now on p. 17.

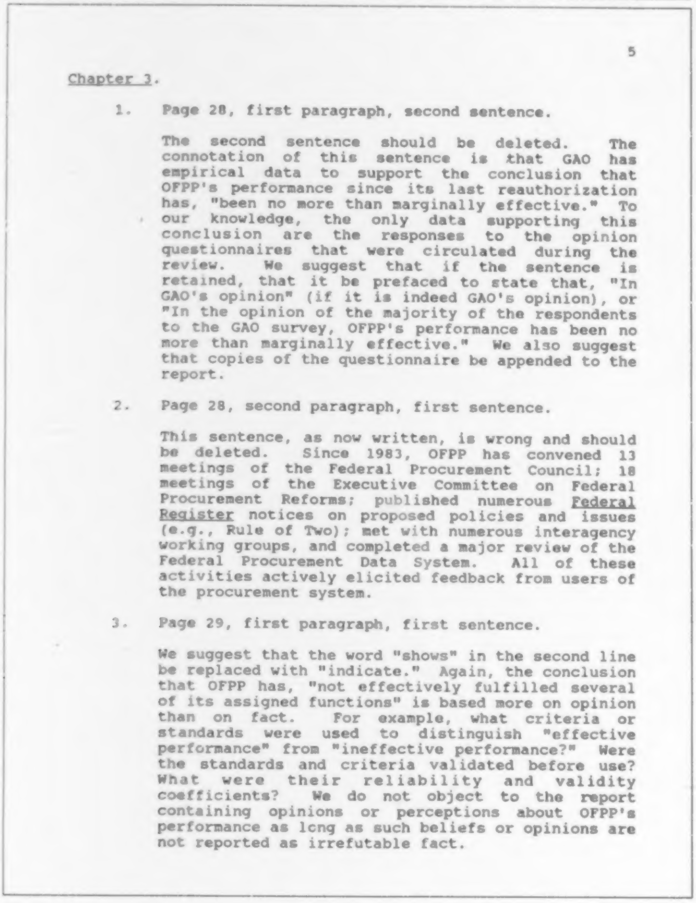
2. Page 24, middle paragraph, first sentence.

The wording of the second and third line of this sentence should be changed to read as follows: "... agreed that the maintenance of uniformity within the FAR and the elimination of inconsistencies between the FAR and agency supplements is a major concern...." The present sentence indicates that agency FAR supplements should be uniform. Just the opposite is true. Agency supplements should contain agency unique regulations. Regulations common to two or more agencies should be in the FAR and not in agency supplements.

Now on p. 18.

3. Page 26, top paragraph, first sentence.

The first sentence should be changed to read as follows: "OFPP is responsible for providing for the Federal Acquisition Institute, a research and management facility dedicated to acquisition work force issues, and for fostering and promoting Government-wide career management programs for a professional procurement work force. The proposed wording is closer to OFPP's existing statutory authority than the present wording.



Chapter 3.

Now on p. 20.
See comment 2.

1. Page 28, first paragraph, second sentence.

   The second sentence should be deleted. The connotation of this sentence is that GAO has empirical data to support the conclusion that OFPP's performance since its last reauthorization has, "been no more than marginally effective." To our knowledge, the only data supporting this conclusion are the responses to the opinion questionnaires that were circulated during the review. We suggest that if the sentence is retained, that it be prefaced to state that, "In GAO's opinion" (if it is indeed GAO's opinion), or "In the opinion of the majority of the respondents to the GAO survey, OFPP's performance has been no more than marginally effective." We also suggest that copies of the questionnaire be appended to the report.

2. Page 28, second paragraph, first sentence.

   This sentence, as now written, is wrong and should be deleted. Since 1983, OFPP has convened 13 meetings of the Federal Procurement Council; 18 meetings of the Executive Committee on Federal Procurement Reforms; published numerous Federal Register notices on proposed policies and issues (e.g., Rule of Two); met with numerous interagency working groups, and completed a major review of the Federal Procurement Data System. All of these activities actively elicited feedback from users of the procurement system.

Now on p. 20.
See comment 2.

3. Page 29, first paragraph, first sentence.

   We suggest that the word "shows" in the second line be replaced with "indicate." Again, the conclusion that OFPP has, "not effectively fulfilled several of its assigned functions" is based more on opinion than on fact. For example, what criteria or standards were used to distinguish "effective performance" from "ineffective performance?" Were the standards and criteria validated before use? What were their reliability and validity coefficients? We do not object to the report containing opinions or perceptions about OFPP's performance as long as such beliefs or opinions are not reported as irrefutable fact.

Now on p. 21.
See comment 3.

4. Page 29, bottom paragraph, last line.

We suggest that the words "issuing regulations" be deleted as OFPP has only limited regulatory authority.

Now on p. 21.

5. Page 30, Table 31.

The data shown in line 3, opposite "Drafting OMB Circulars" should be changed as follows: delete (a) under Aug 74-Sept 79 and replace with (3); delete (a) under Oct 79-Sept 83 and add (6); delete 11 under Oct 83-Dec 86 and add (4). In the last line opposite "Issuing Policy Letters" delete (8) under Aug 74-Sept and add (11); delete (13) under Oct 79-Sept 83 and add (16); delete (2) under Oct 83-Dec 86 and add (3).

Now on p. 21.

6. Page 30, last paragraph.

We suggest that this paragraph be rewritten as follows: "OFPP officials consider policy letters to be one of OFPP's most effective tools for influencing procurement policy. Although the issuance of such letters has dropped noticeably during the most recent authorization period, OFPP officials believe that this does not reflect a lessening of their effectiveness or performance. OFPP officials believe that the decline in policy letters during the most recent reauthorization period reflects: (1) the conclusion and completion of many issue areas proposed by the Commission on Government Procurement; (2) an increase in procurement legislation to address issues which earlier might have been subject of policy letters; and (3) the creation, issuance and maintenance of the FAR, which demanded most of OFPP's resources during this current period." One of the major differences that should be noted in comparing the numbered policy letters issued by OFPP during the immediate and past reauthorization periods is that many unresolved Commission on Government Procurement recommendations constituted a sizeable policy letter agenda for the previous periods. Many of the "easier issues" noted by the COGP have now been dealt with in policy letters and the ones remaining are difficult, involve contentious issues, and most will require legislation to resolve.

Now on p. 22.
See comment 4.

7. Page 31, Table 3.2.

This table is difficult to understand. The years at the top legend do not relate to OFPP's three previous reauthorizations, i.e., 1974-79; 1979-83 and 1983-87. The table purports to summarize "perceptions" presented in the paragraph that precedes it. It is difficult, however, to relate the table to the paragraph or the perceptions. We suggest that the table be clarified.

Now on p. 22.

8. Page 33, first paragraph.

We suggest that the references to "OFPP" in lines two and five be replaced with OMB. The model charter for Agency Procurement Executives (issued in 1982 and not in 1984 as indicated in the paragraph) and the criteria for enhancing competition were issued by the Director and Deputy Director, OMB, respectively. OFPP guided the preparation of both documents but they were actually issued by OMB. The reference to "policy letter" in line five should be changed to "policy guidance." OFPP did not issue a policy letter, instead the Deputy Director, OMB issued a memorandum to agency heads. The sixth line of the paragraph should be rewritten as follows: "... criteria for enchancing competition and evaluating/certifying procurement systems. As of September 1987, thirty-one." In the next to the last sentence of the paragraph the words "executive committee" should be deleted and replaced with OFPP.

Now on p. 23.

9. Page 33, second paragraph.

This paragraph implies that OFPP was negligent during the March 1982 to March 1987 period because it continued to focus the majority of its attention on the implementation of Executive Order 12352. Executive Order 12352 is the first and only Executive Order directed solely at procurement reform. It called for broad based procurement reforms that could only be implemented over a number of years. In 1986, with the appointment of a new Administrator, OFPP did start to move into new areas, but this was not because of any failure on OFPP's part to recognize that the FAR and other initiatives such as competition were important. OFPP started tracking and monitoring competition, at least as far back as 1982, if not before. It is recommended that this paragraph be deleted, or at least, be redeveloped on a balanced basis.

Now on p. 24.

10. Page 34, last paragraph.

We suggest that the words "prior to 1987" be added to the 5th line and that the word "issue" in the fifth line be replaced with the word "change." OFPP did not attempt to "issue" the rule of two. The rule was "issued" years ago. OFPP attempted to replace the rule of two with a new rule. The new rule would have changed the criteria used by contracting officers in determining whether to set procurements aside for small business. Accordingly, the word "methods," in the sixth line should be deleted and replaced with "criteria." The method of setting a contract aside is still the same - it's done by determination of the contracting officer. Only the criteria used in making the determination would have been changed by the OFPP proposal. The last two sentences of this paragraph (top of page 35) should be changed to read as follows: "After the FAR Councils refused to implement the requested change, OFPP drafted a proposed regulation and requested public comments. The proposal to change the rule of two, however, proved to be very controversial and Congress eventually directed OFPP to make no further efforts to implement the change." Congress also provided guidance on this issue in the Defense Authorization Act of 1987 (P.L. 99-161) and additional action to change the rule is not expected at this time.

Now on p. 25.

11. Page 35, middle paragraph.

It is suggested that the following three sentences be added to the end of this paragraph: "OFPP has also recently reemphasized its regulatory role. In the nine month period ending, September 30, 1987, for example, the office had reviewed 68 proposed procurement regulations, and provided comments or raised objections to 35. Similarly, the office analyzed 46 proposed procurement paperwork cases (submitted to OMB by the agencies for clearance in accordance with the Paperwork Reduction Act) and provided comments or raised objections on 18 of them."

Now on p. 24.

12. Page 36, first paragraph, sixth line.

We suggest that the word "the" at the beginning of line six be deleted and that the words "duplicate, inconsistent, or other inappropriate" be inserted in its place. This change is needed to qualify OMB's rescission authority which is limited to such circumstances.

Now on p. 26.

13. Page 37, last paragraph.

This paragraph states that "industry representatives" are not satisfied with the present process of publicizing proposed regulations. Merely stating industry's dissatisfaction is of little value or purpose. What is GAO's view on this issue? Are industry's concerns justified and valid? What different procedures, if any, should be used, etc.? We suggest that this paragraph be deleted or rewritten to address some of the above questions.

Now on p. 27.

14. Page 40, first paragraph.

The last sentence of this paragraph indicates that GAO found a reluctance by OFPP to "initiate needed changes." Either examples of the "needed changes" identified by GAO should be provided or the sentence should be deleted.

Now on pp. 27 and 28.

15. Page 41, second paragraph.

This paragraph is typical of several in the report. It alludes to a problem, accentuates the negative but offers no positive, constructive suggestions. The paragraph states that poor use has been made of the Federal Procurement Council and that 17% of the Procurement Executives believe the Council has had little or no effect. The paragraph does not acknowledge that 25% of the Procurement Executives considered the Council to be very effective, nor does it provide the specific concerns mentioned by the Procurement Executives.

Now on p. 31.

16. Page 46, last paragraph.

It is suggested that the third line be changed to: (1) add a period after the word "leadership" and (2) insert a new third sentence that would read: "Renewed support from the Director and Deputy Director of OMB is also evident and OFPP has acted to fill several longstanding vacancies."

Now on p. 31.

17. Page 47, last paragraph.

The fourth line of this paragraph should be rewritten as follows: "... DOD to rescind its rules of retaining amounts, without cause, from progress payments made under Federal Construction Contracts."

Now on pp. 31 and 32.

18. Page 47, addition of new paragraph.

A new concluding paragraph, to recognize other features of OFPP's agenda, should be added as follows: "In addition to its regulatory reform efforts, OFPP has developed a comprehensive agenda that includes initiatives to:

- restore the authority of contracting officers by establishing short, unambiguous lines of authority;
- draft a consolidated, simplified procurement statute -- applicable Government-wide;
- simplify contracting procedures--increase the potential for competition--while favoring the purchase of commercially available items;
- streamline the regulatory development process; and
- improve procurement data collection; streamline the procurement process through more use of automation; and make better use of its testing authorities to try out new, more efficient ways of doing business.

These initiatives, if carried out in the manner presently envisioned by OFPP, will result in substantial improvements in the procurement program."

Chapter 4.

Now on p. 33.

1. Page 48, last paragraph.

We suggest that the word "reveal" in the third line be replaced with "indicated." Opinion surveys do not normally "reveal" facts. They generally provide an indication of opinion which may or may not correspond to factual situations.

The following are our comments on OFPP's letter dated October 1, 1987.

Our Comments

1. The basis for our information is information contained in interviews with OFPP officials. While OFPP officials told us that they always obtain comments from the procurement community, we did not attempt to verify this statement.

2. In developing a methodology for assessing OFPP's effectiveness, we recognized that established criteria did not exist for assessing OFPP's performance. In this situation, we decided that the best measure of effectiveness would be the opinions of the users of the procurement system. We interviewed the procurement executives in the federal government whose agencies were collectively responsible for over 95 percent of the dollars spent. We also interviewed recognized procurement experts from private industry. Many of these also had experience as federal executives involved with procurement issues.

3. OFPP has the authority to issue regulations under specific circumstances.

4. The periods referred to in the top legend correspond to OFPP's first two authorization periods. The third period corresponds to the start of the third authorization period through December 1986. This closing date corresponded to the time when we were finalizing our questionnaire and provided a uniform framework for discussion purposes.